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Supreme Court, U.S.
FILED

09-143 JUL 30 2009

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No. ____

In The
Supreme Court of the United States

HUDSON AREA SCHOOLS,
Petitioner,

v.

DAVID PATTERSON AND DENA PATTERSON,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

TIMOTHY J. MULLINS
Counsel of Record
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. BIG BEAVER ROAD
10TH FLOOR
TROY, MI 48084-5280
(248) 457-7000

Counsel for Petitioner

July 30, 2009

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether a school district is deliberately indifferent to peer on peer sexual harassment under *Davis v Monroe County Pd of Educ*, 526 U.S. 629 (1999), where the school effectively responds to individual complaints of harassment to the extent that when a report of harassment is made, the perpetrator is disciplined and counseled, and the perpetrator no longer harasses the complaining student; the school provides the complaining student with individual counseling to help cope with peer issues; the school enacts policies prohibiting harassment; and the school institutes programs teaching students the dangers of harassment; but new students commit subsequent acts of sexual harassment against the complaining student.

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The decision of the court of appeals is reported at 551 F.3d 438 and is reproduced in the Appendix herein at 1a. The decision of the U.S. District for the Eastern District of Michigan is not officially reported but is available at 2007 U.S. Dist. LEXIS 87309 and is reproduced in the Appendix at 50a.

JURISDICTION

The judgment of the court of appeals was issued on January 6, 2009. Petitioner's timely petition for rehearing and rehearing en banc was denied on May 1, 2009. Pet. App. 78a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, provides:

> (a) Prohibition against discrimination; exceptions. No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

STATEMENT

This case concerns the continuing viability of the deliberate indifference standard set forth in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651, 654,

119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999). In *Davis*, this Court stated that a school district may only be liable for student-on-student sexual harassment under Title IX when it is "deliberately indifferent" to acts of harassment of which the school is "actually" aware. Under *Davis*, the deliberate indifference standard only required a school to "merely" respond to complaints in a manner that is not "clearly unreasonable." *Davis* unequivocally stated that when responding to complaints of peer sexual harassment under this standard, school districts are not required to "remedy" or "purge" themselves of the harassment in order to avoid liability at the summary judgment level. See *Davis*, *supra*, 526 U.S. at 648. *Davis* found that to require such a high standard would be unreasonable, and given the unique environment of schools, it would also be impossible.

Despite the finding of *Davis*, the majority opinion below found that effective responses to complaints of harassment, policies prohibiting harassment, and instituting programs teaching students the dangers of harassment are insufficient under *Davis* to avoid a finding of deliberate indifference. Rather, the majority opinion below required the school under the deliberate indifference standard to prevent future acts of sexual harassment by unidentified students. In essence, the Majority Opinion requires schools to "remedy" all offensive behavior and be completely harassment-free, which the Supreme Court has unequivocally held is not required -- or even possible. See *Vance v. Spencer County Pub. School Dist.*, 231 F.3d 253, 260-61 (6th Cir. 2000) (citing and quoting *Davis*).

In the present case, Respondent Student Dane Patterson ("Respondent") was a high school student in

Hudson Area Schools. Respondent's parents Dena and David Patterson filed suit on behalf of their son alleging that during part of middle school and ninth grade, Respondent was subjected to student-on-student harassment which had denied him access to a public education. The complaints of harassment almost exclusively consisted of name-calling, most of which was non-sexual. Petitioner Hudson Area Schools responded to Plaintiff's complaints in three ways:

First, in each situation where Respondent made a complaint, Petitioner's administrators took action by investigating the incident and, if the perpetrator was identifiable, reprimanding the perpetrator and imposing the punishment. In some instances, punishment meant a verbal reprimand and/or extracting an apology from the perpetrator(s). In some instances, punishment meant a suspension. Finally, in one case it meant expulsion. Significantly, no identified perpetrator ever harassed or caused problems for Respondent after being disciplined by the school. There were no repeat offenders, so the only reasonable conclusion from the undisputed facts in the record is that the school's actions, with respect to those offenders, were 100% effective.

Second, it is undisputed that Petitioner also provided Respondent with individual counseling to cope with peer related issues. Petitioner provided Respondent with a resource room for individual assistance with school work, individual counseling sessions with School Social Worker Tammy Cates, seating preferences to avoid students with whom Respondent had a problem, and group and individual sessions with School Counselor Susie Mansfield. Although Respondent admitted that the assistance the

School provided cured his problems before entering the ninth grade, Petitioner offered to continue to provide these services. However, Respondent's refused most of Petitioner's assistance. In addition, Petitioner made arrangements for Respondent to meet with middle school resource room teacher Ted Adams, whose counsel provided Respondent a great benefit, each week.

Third, Petitioner had effective policies in place regarding student discipline and conduct. Testimony and evidence established that Petitioner's staff and students were well trained as to those policies. Further, the school established more than a dozen programs which addressed problem behavior such as sexual harassment and bullying, as well as teaching general acceptable student conduct, during Respondent's time as a student on campus.

A. Facts

Respondent Dane Patterson ("Respondent") is a former student at Hudson Area Schools ("Petitioner"), who began attending Petitioner's schools in the sixth grade, which was the 2001-2002 school year. Respondent sued Petitioner because he claims he was sexually harassed by other students during parts of middle school and ninth grade.

1. Complaints and Responses

In the second semester of his sixth grade year, and continuing through his seventh grade year, Respondent alleges that he began experiencing problems with other students while at Petitioner's School. Respondent does not recall specific instances,

but claims he was called names and pushed while walking down the hallway. This would occur during the brief interval between classes when all of the students were in the hallways changing classes. A 646. Respondent clarified that he was never beat-up, involved in any fist fights, injured or fondled; only that he was allegedly called names and nudged or tripped. A 652-656.

Although Respondent admits that teachers regularly monitored the hallways between classes and were available for him to make a complaint, A 617, Respondent did not report these alleged instances to school officials when they occurred. Respondent conceded he only made "a couple" of reports total while in sixth grade, one to teacher Gwen Marry and one to middle school Principal Rozeveld. A 648. Respondent also testified that, with the exception of a couple of reports made early in the school year while in seventh grade, he did not report these incidents to school officials either. A 655. Respondent does not recall the substance of these reports and does not recall whether he identified any particular students with whom he had a problem. A 650. Respondent does not dispute that the situations were addressed by the School when reported. A 649.

Respondent's parents claim they were in repeated contact with Respondent's teachers regarding his general problems, but admit they did not identify students with whom Respondent had problems. A 818. They also did not identify specific incidents which Petitioner could address. *Id.* School counselor Susan Mansfield had several conversations with Respondent's mother regarding Respondent. A 463. In most of these conversations, Respondent's mother

expressed her concern over family health problems and how they affected Respondent[1], but she never identified any specific instances of harassment Dane experienced at the hands of other students. *Id* at 45-47, A 463-465.

Although Respondent was performing well in school and did not appear to experience the purported problems with others, Defendant School still vigorously responded to Respondent's concerns.

In response to the concerns, during his seventh grade year, Respondent's teachers and other staff agreed to keep a watch out for him. A 813; A 761. One teacher offered ideas to help Respondent better cope with his peer problems, which Respondent did not accept. A 525; A 817. Middle school Principal Rozeveld also offered to meet with Respondent after school each day to provide assistance. Respondent, however, stopped meeting with him after a few weeks because he was afraid other students would perceive the meetings to mean he was a troublemaker. A 821.

Petitioner offered Respondent additional assistance that he refused. School counselor Susan Mansfield established small group and individualized counseling sessions for students experiencing problems with peer relations. A 470-472. Mansfield went from class to class promoting her services while Respondent was in middle school. A 470. Respondent, however, never reported any problems to Mansfield, or attended any

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[1] Dane's younger brother Jarrett suffered from a life-threatening condition. Also, Dane's father suffered a stroke during Dane's seventh grade year.

sessions. *Id*. Respondent also refused services from the school social worker, Tammy Cates. A 373.

Respondent and his parents refused outside assistance as well. Respondent refused to attend sessions with his psychologist. Moreover, though Respondent complained that he struggled academically, Respondent and his parents refused to allow Dane'solder brother, Andy, to tutor him. A 822.[2]

School records confirm that Respondent'sgrades and school attendance were largely unaffected by the purported problems. A 23-29. During this time, Respondent was also involved in several extracurricular activities. Respondent ran cross country, played on the basketball team, joined the wrestling squad, participated in Science Olympiads and was involved in a Japanese exchange program.

Although Respondent had displayed emotional outbursts at home since at least fifth grade[3], Respondent's parents refused to submit a referral for special education services. Petitioner's school counselor Mansfield and school social worker Cates ultimately

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[2] Andy was in college at the time and living at home with the Patterson family. He was extremely bright, as he was the valedictorian of his high school class.

[3] One year prior to attending Petitioner's School, Respondent was sent to see a psychologist due to frequent emotional outbursts directed at his family (which would continue for the next few years) and increasing physical aggression towards his younger brother. Id; A 812. During his interview with the psychologist Dane complained that his family seriously mistreated him. A 12-13.

submitted an application for special education services on Respondent's behalf at the end of his seventh grade year, in May 2003. A 30.

Upon receipt of the referral, Petitioner sent school social worker Cates and psychologist Brian Moeckel to Plaintiffs' home for an evaluation during their summer vacations. A 570; A 374. The timing of the visit was unusual because, since the referral was made at the end of the school year, the interviews did not have to occur until the following school year. *Id.*

Based on his meetings with Cates and Moeckel, and prior to entering the eighth grade, Respondent was determined to be emotionally impaired. A. 30-38. Because Respondent was recognized as having a qualifying disability, Respondent was provided with special education services through an Individualized Education Program ("IEP").[4]

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[4] Under Michigan and Federal law public schools are required to provide special education services and accommodations through an IEP to all students with a qualifying disability. See generally the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq; Mandatory Special Education Act MCL 380.1701 et seq. Once a year the parents and education professionals, known as the multidisciplinary evaluation team, convene as the "IEP Team" to determine the student's individual needs. From those findings the IEP Team develops an educational program for the student that is in the best interest of the student. This program dictates what services the school must provide the student. School employees cannot unilaterally modify the terms of the IEP, and decide to impose different accommodations or restrictions than those contained therein. See generally, *Bd. of Education v. Rowley*, 458 U.S. 176 (1982). The parent present for the meeting must also approve the IEP. If the parent disagrees with the IEP, the parent must appeal the services provided under the IEP using the

Through his IEP, Petitioner placed Respondent in a resource room, and referred him to meet with social worker Cates for counseling. A 42. Respondent was also given extra time to take exams and seating preferences to avoid students with whom he had a problem. *Id.*

Respondent admits that the resources Petitioner provided worked well as he showed improvement and his problems with other students all but ceased. A 621-623. Respondent particularly liked working with Petitioner's resource room teacher, Ted Adams. According to Respondent's mother, "Mr. Adams is a remarkable man" who took a special interest in Respondent. A 825-827. During this time, however, Respondent still refused any counseling assistance from school counselor Mansfield and he refused to attend his meetings with Cates. A 643; A 380-381.

Following his eighth grade year, an IEP was developed for Respondent which once again provided him with personal assistance to cope with his emotional impairment while in ninth grade. As with his eighth grade IEP, Respondent's ninth grade IEP provided Respondent with a resource room, daily as needed, and individual counseling sessions with social worker Cates. Respondent also had access to school counselor Mansfield's peer groups and individual counseling sessions. See Respondent's Interrogatory Response which is reproduced in the Appendix at 80a.

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administrative process set forth in R 340.1722a, 340.1724, 340.1851-1854.

But as in eighth grade, throughout ninth grade, Respondent would not meet with social worker Cates, and he refused to attend student group sessions led by school counselor Mansfield. In addition, despite the apparent progress Respondent made while utilizing the resource room in eighth grade, Respondent's parents refused to allow him to meet with the High School resource room teacher. In answers to interrogatories, Respondent's parents reasoned: "Due to Mr. Adams being a middle school resource room teacher, Dane would not have Mr. Adams for ninth grade. Therefore, we decided not to place Dane with another resource room teacher." See Respondent's IEP, which is reproduced in Appendix at 81a. To encourage Plaintiffs to use the resource room, the school made Mr. Adams, who was strictly a middle school resource room teacher, available to assist Dane while in high school. A 762-763; A 339-340; A 625.

After he refused the Petitioner's assistance, Respondent alleges he was once again called names when he entered high school, during the 2004-05 school year. Respondent reported five separate incidents of name-calling, all committed by different individuals that year. In each situation where Respondent made a complaint, it is undisputed that Petitioner's administrators took action by investigating the incident and, if the perpetrator was identifiable, reprimanding the perpetrator and imposing punishment. For a first offense, the perpetrator was given verbal reprimand and an apology was extracted. Respondent testified that in all but one instance where a student was reported, Petitioner took action and the offending student never bothered Respondent again. A 38, 59-62, 411, 466-470, 597-598, 621-630, 657-661. In the lone instance when

a student harassed Respondent a second time, Petitioner escalated its response and the offending student was suspended from school. A 598.

Respondent's grades and attendance were unaffected by the purported problems. Respondent maintained semester grades of mostly A's and B's and missed only seven days of school the entire year. A 23-29. Respondent was still involved in extracurricular activities, such as joining the baseball team and participating in a Japanese exchange program.

Toward the end of ninth grade, on Friday, May 13, 2005, Respondent was involved in an incident occurring in the gym locker room following baseball practice. Respondent was on the junior varsity baseball team which was coached by his older brother, Andy Wade. A 664. Instead of supervising the locker room as required by School policy and as he was instructed, Andy left after practice. A 664.

When Respondent was in the locker room gathering his belongings to go home, some horseplay began between Respondent and two other students, LP and NH A bystander to the event, BH., stated he heard laughter in the other part of the locker room. A 59-69. When he went to see what the laughter was about, the horseplay escalated and Lance was rubbing his genitals on Respondent's back and head. *Id.* LP admitted that what he had done was wrong and described it as a stupid locker room prank that went way too far. *Id.*, A 61-62. BH stated that after the event, "Respondent didn't look like he was mad. He laughed." *Id.*, A 69. BH. then confirmed that he had never seen anything like this before in the locker room.

Id. Respondent admitted he never had a prior problem with LP before this incident. A 634.

Respondent informed his parents of the incident shortly afterwards. Respondent's brother, the team's baseball coach, was informed later that night. Respondent's parents decided not to contact police and did not immediately inform the school of the incident. A 769. Instead, Respondent's parents decided that he would play baseball in the doubleheader scheduled the next day. *Id* at 6, A 768. Respondent's brother, Andy, knowing what occurred, put LP in the starting lineup the next day. *Id.,* A 631. Respondent did not inform Petitioner of the incident until during the doubleheader. A 634. Respondent decided not to contact police the entire weekend and, instead, wanted Petitioner to handle the discipline.

On Monday, school principal Michael Osborne and assistant principal Tom Durbin began conducting a formal investigation into the allegations. A 612. LP was immediately suspended for the remainder of the school year and was expelled soon thereafter. LP was denied in his application for reentry into the school. Though Respondent informed the school and police that NH was only "joking around", he was still punished by the school. A 60; A 612. Petitioner fully cooperated with the Hudson Police Department in its investigation into the matter. Petitioner shared the results of its investigation with the police. A 610; A 63-65. Following the expulsion hearing, LP was criminally prosecuted. No criminal charges were ever brought against NH Dane continued to play on the baseball team, remained in school the rest of the year, and completed his finals, earning mostly A's and B's that semester as well. A 23-29.

Following Respondent's ninth grade year, Respondent's parents decided Respondent was to be home-schooled. In response, Petitioner provided Respondent a formal individualized education. As part of his new curriculum, Petitioner paid for Respondent to take advanced classes at Adrian College, an expensive private college. He also attended Jackson Community College taking classes such as Japanese which has helped him become fluent in the language. A 633. Respondent has been successful in his home school program provided by the School, earning A's and B's and Respondent admits that he is very happy in the program currently provided by the School: "Yes. It's good. It's great to be successful right now, not having any trouble." A 751.

2. Petitioner's Programs and Policies

Petitioner took sexual harassment and bullying seriously before Respondent began attending Petitioner's schools. Beginning in 2000, a student conduct component was added to the Health class curriculum. This component specifically addressed bullying and harassment, and taught students the dangers of such. Court of Appeals Appendix ("A") 592.

In 2002, while Respondent was in sixth grade, Petitioner conducted student surveys to gauge the overall school climate, including students'sview of sexual harassment. In response, Petitioner adopted several policies addressing, prohibiting, and protecting against sexual harassment, and promoting general proper conduct among students. A 84-88, 94-101; A 302-310.

In 2002, Petitioner formally adopted a two page policy prohibiting all forms of student harassment. This policy provided in part:

> Harassment of students is prohibited, and will not be tolerated. This includes inappropriate conduct by other students as well as any other person in the school environment

A 96-97. This policy went on to define harassment, and sexual harassment specifically, so that students would know what behavior to report:

> Sexual Harassment may include, but is not limited to:
>
> A. verbal harassment or abuse;
> B. pressure for sexual activity;
> C. repeated remarks with sexual or demeaning implications;
> D. unwelcome touching;
> E. sexual jokes, posters, cartoons, etc.;
> F. suggesting or demanding sexual involvement accompanied by implied or explicit threats concerning one's grades, safety, job, or performance of public duties.

A 96-97. This policy also provided reporting procedures in case of an incident of harassment. *Id.*

Also prior to Respondent's complaints, Petitioner adopted a three page policy prohibiting bullying, which also prohibited sexual harassment. *Id.* This policy provided:

> The Board of Education is committed to providing a safe, positive, productive, and nurturing educational environment for all of its students. The Board encourages the promotion of positive interpersonal relations between members of the school community. Aggressive behavior toward a student, whether by other students, staff, or third parties is strictly prohibited and will not be tolerated. This prohibition includes physical, verbal, and psychological abuse such as bullying and hazing. The Board will not tolerate any gestures, comments, threats or actions to a student which cause or threaten to cause bodily harm, reasonable fear for personal safety, or personal degradation.

A 98. Like the policy prohibiting harassment, this policy contained a reporting provision, and specifically proscribed harassment of any form. A 100.

The student handbook, which was distributed to students on the first day of school, also contained a prohibition against sexual harassment. The handbook provided:

> **CODE OF CONDUCT**
>
> Sexual harassment Sexual harassment is a form of misconduct which undermines the integrity of the student body relationship. All H.A.H.S. students must be allowed to learn in an environment free from unsolicited and unwelcome sexual comments and overtures. Sexual harassment refers to behavior, which is not welcome, which is personally offensive,

> which weakens morale, and therefore interferes with the learning effectiveness of its victims and their co-students.
>
> In fulfilling its obligation to maintain a positive and productive learning environment, H.A.H.S. will make every attempt to halt any harassment of which it becomes aware by calling attention to this policy or by more direct disciplinary action. If necessary, reprimands, detentions, suspension or legal action will be taken. Any complains should be notified to the Administration. Parents will be notified.

A 304. Students were instructed on the policies, and acceptable conduct while attending Petitioner's schools. At the beginning of each school year, teachers spent a portion of the first day of class discussing with the students the student handbook, including the student code of conduct. A 341-343; A 557; A 527.

Petitioner's employees were also trained on the above policies. During in-service training sessions held at the beginning of the school year, school personnel were provided with copies of the Petitioner's policies regarding student conduct and spent significant time discussing appropriate student conduct, which included bullying, sexual harassment, and assaults. A 558; A 526.

To further minimize harassment or bullying in the school, while Respondent attended Petitioner's schools, Petitioner had in place specific policies regarding hallway, lunchroom, and locker room supervision. These policies required teachers and administrators to supervise these areas at all times based on shifts.

School district administrators and teachers were advised of, and trained on, the above policies. A 593-594.

During the 2002-05 time period, when Respondent claims he was being harassed, Petitioner also initiated several programs aimed at educating students, staff, parents, and members of the community on student conduct, including harassment and bullying. In 2002, when Respondent was in sixth grade, Petitioner developed a program called the "40 Developmental Assets." A 594. As part of the program, Petitioner had speakers come in and help faculty and staff identify harassment and develop positive attributes in students. A 594. In the 2003-2004 school year, Petitioner initiated the "Character Counts" program, which addressed correcting problem behavior among students. A 80-81. In 2005, when Respondent was in ninth grade, Petitioner started the Campaign for Kindness, which promoted student sensitivity. Petitioner also hired Bonnie Dunn to continually assess the School environment. A 594-595.

The School also put on performances, such as "Bang, Bang, You're Dead", while Respondent was in middle school. This performance addressed the problems causing the Columbine tragedy, such as bullying and teasing. A 589. Following the performance, a community forum was held to discuss myriad of problem behavior among students. *Id.*

During the 2002-05 time period, Petitioner also brought in several speakers, such as ex-NFL players Jacob Jacoby and Paul Dunbar, Miss Michigan, and Miss Raisin Queen, to speak on issues of bullying and

harassment. A 584-587. Jacoby also held an evening assembly for parents. A 587.

School Counselor Mansfield also implemented several programs for students which addressed harassment and peer relations when Respondent was in middle school. Ms. Mansfield initiated: individual and group counseling sessions specifically to address bullying and harassment issues A 24-25; the "Flirting and Hurting Program," which addressed sexual harassment and bullying A 462; the "CATS Program," which addressed dating, bullying, and peer pressure; the "Peer Mediation Program," where students were trained to effectively mediate student problems A 80-81; and "Positive Peers," which was a mentoring service aimed at addressing kindness, bullying, peer pressure, and conflict resolution. *Id.*

3. Procedural History

A year after Petitioner began paying for Respondent to be home schooled, Respondent's parents filed suit against Petitioner Hudson Area School and Superintendent Dr. Kathy Malnar in the U.S. District Court for the Eastern District of Michigan alleging a violation of Title IX, and pursuant to 42 U.S.C. 1983, a violation of Respondent's Equal Protection Rights.

Petitioner filed its motion for summary judgment, and on November 28, 2007, the District Court granted Petitioner's summary judgment on the basis that it was not deliberately indifferent to Dane's complaints of sexual harassment. The Court found that administrators at Hudson Area Schools repeatedly took adequate and effective remedial action reasonably calculated to end harassment, eliminate the hostile

environment, and prevent harassment from occurring again. In support of this conclusion, the Court noted that in each reported situation, the perpetrator did not cause Respondent any further problem. The trial court also found that Petitioner had in place effective policies prohibiting sexual harassment, which were taught to students and faculty. The trial court further determined that Petitioner had instituted myriad of programs designed to educate students and staff on bullying and harassment. Finally, the trial court found that Petitioner provided Respondent with personal assistance to cope with peer issues. The Court concluded that, as a matter of law, Petitioner's responses were not "clearly unreasonable" in light of known circumstances. Judge Zatkoff rejected Respondent's arguments that the School's punishment of students was not severe enough, since Respondent does not have a right to dictate the actions Petitioner takes. Respondent appealed the district court's decision only as to the issue of deliberate indifference under Title IX.

On January 6, 2009, in a split decision the Sixth Circuit reversed. The majority found that, although Petitioner effectively disciplined individual offending students to the extent that disciplined students never again posed a problem to Respondent, Petitioner had policies in place prohibiting sexual harassment, and Petitioner developed and instituted two programs dealing with sexual harassment - though it acknowledged almost a dozen additional programs addressing student conduct, it was nonetheless a question of fact whether the School was deliberately indifferent. The below court found that Petitioner's efforts were ineffective in preventing future acts of sexual harassment by new, unidentified offenders, and

therefore, should not be shielded from liability by summary judgment.

In coming to its conclusion, the majority ignored the personal assistance Petitioner provided to Respondent, and the policies instituted for hallway and lunchroom monitoring, designed to negate the effect of bullying and harassing behavior. The majority also discounted fourteen different programs and groups instituted over a four year period addressing appropriate student conduct as a whole, which included sexual harassment. See generally, A 584-595; A 490-498, 470. For example, the Majority ignored the full scope of the "Bang-Bang Your Dead" program (compare Majority's treatment of program, P. 18, n. 10, with testimony from Principal Osborne, A 588-589), and is highly critical of the "long term effectiveness" of other programs. This criticism directly conflicts with *Davis* and *Vance*, which caution Courts against second guessing schools' responses to reports of sexual harassment. *Davis*, 526 U.S. at 648.

The majority also improperly questioned the veracity of whether the School implemented its policies regarding sexual harassment by relying on the affidavit of Respondent's brother, Andy Wade, who was a substitute teacher for a brief period in 2004. Wade testified he did not teach the school policy to his students. Wade's affidavit is defective because Wade alleges he was hired several days into the school year. Opinion P. 18 n. 10. However, teachers taught the school's policy on the first day of school. A 341-343; A 557; A 527. Therefore, Wade is not competent to testify whether the students were ever taught the prohibition against sexual harassment. Additionally, Wade testified he never taught the "Flirting and Hurting"

program. Wade testified, however, he was hired as a substitute eighth grade Health teacher in 2004. Opinion P. 18 n. 10. However, that program was taught during ninth grade Health class that year. A 496-497. Again, Wade was not competent to testify whether the "Flirting and Hurting" program was taught, and reliance on such evidence is improper. It is worth noting that the complained of sexual assault occurred when Respondent's brother, Wade, failed to supervise the locker room as instructed. A 664.

REASONS FOR GRANTING WRIT

The majority opinion below is in conflict with *Davis*. While *Davis* finds that school districts may be held liable for student on student sexual harassment, a school may only be held liable if it remains deliberately indifferent to sexual harassment of which it is actually aware. This standard does not require schools to remedy or purge itself of sexual harassment in order to avoid liability. On the contrary, *Davis* is clear that under the deliberate indifference standard schools need only merely respond to complaints of sexual harassment in a manner that is not clearly unreasonable. In conflict with this standard, the majority below held that schools' response to harassment may still be deliberately indifferent if its action are 100% effective against the individual harassers, but there is subsequent harassment by new offenders. This Court did not intend for schools to respond with that degree of precision when crafting the deliberate indifference standard. The majority opinion below also conflicts with the Third Circuit. Under a virtually identical fact pattern as presented to the majority below, the Third Circuit found that the school was not deliberately indifferent because it

responded effectively to each complaint of harassment that was reported, to the extent that each reported student never harassed again. In contrast, the majority below found that 100 percent effective discipline was not enough. The majority opinion is not practical, and will open schools to a flood of litigation. The school setting is a unique place where bad behavior among students is inevitable. The majority opinion has held school districts to a nearly impossible standard to satisfy in light of the setting.

ARGUMENT

A. The Majority Opinion Below Is In Conflict With *Davis v. Monroe County Board Of Education* And Its Progeny

In *Davis v. Monroe County Bd. of Educ.*, 526 US 629 (1999), this Court determined that a school district may be liable under Title IX for student on student harassment, but only in limited circumstances. This Court determined that a plaintiff may bring a cause of action under Title IX for student on student sexual harassment only if the plaintiff can establish the following elements:

> 1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;
> 2) the funding recipient [the school] had actual knowledge of the sexual harassment; and
> 3) the school was deliberately indifferent to the harassment.

Davis at 653. The issue on appeal before the Sixth Circuit was whether the Petitioner School was deliberately indifferent to Respondent's complaints of harassment.

Historically, courts have acknowledged that deliberate indifference in a Title IX case is very difficult to establish. *Doe ex rel Doe v. Dallas Indep. Sch. Dist.*, 220 F3d 380, 384 (5th Cir. 2000), cert. denied, 531 U.S. 1073 (2001). This Court has determined that deliberate indifference is shown only where a school knows of and disregards an excessive risk to the student's health or safety. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). It must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and, further, it must actually draw that inference. *Id.* Deliberate indifference presupposes that the school knows of a Title IX violation, but it "refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).

In the context of Title IX peer on peer harassment cases, this Court has made the deliberate indifference standard an even higher hurdle to clear. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subjects" its students to harassment. *Davis, supra*, 526 U.S. at 644-645. This Court has found that this occurs "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." See *Davis, supra*, 526 U.S. at 648.

Davis has rejected the argument that this standard requires schools to "remedy" peer harassment to avoid liability. *Davis*, *supra*, 526 U.S. at 648. The Court elaborated that the deliberate indifference standard "does not mean that recipients can avoid liability only by purging schools of actionable peer harassment or that administrators must engage in a particular disciplinary action." *Id.* "On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id.* at 648-649.

Under this standard, "[s]chool administrators will continue to enjoy the flexibility they require" in the area of school discipline. *Davis* at 648. Rather than scrutinizing schools' discipline decisions with the benefit of hindsight, this Court cautioned that "courts should refrain from second guessing the disciplinary decisions made by school administrators." *Davis*, 529 U.S. at 648, citing to *New Jersey v T. L. O.*, 469 U.S. 325 (1985).

Relying on *Davis*, the Sixth Circuit in *Vance v. Spencer County Pub. School Dist.*, 231 F.3d 253 (6th Cir. 2000), described the standard as follows:

> The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo harassment or make them liable or vulnerable' to it."
>
> The recipient is not required to "remedy" sexual harassment nor ensure that students conform

> their conduct to certain rules, but rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." The standard does not mean that recipients must expel every student accused of misconduct. Victims do not have a right to particular remedial demands. Furthermore, courts should not second guess the disciplinary decisions that school administrators make.
>
> The Supreme Court has pointedly reminded us, however, that this is 'not a mere "reasonableness" standard' that transforms every school disciplinary decision into a jury question." In an appropriate case, there is no reason why courts on motion for a directed verdict could not identify a response as not "clearly unreasonable" as a matter of law. (internal citations omitted).

Vance, 231 F.3d at 260.

Circuits interpreting the deliberate indifference standard have determined that a negligent response to a complaint of harassment does not satisfy the deliberate indifference standard. For example, citing *Davis*, and the Sixth Circuit in *Vance*, the Tenth Circuit in *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121-24 (10th Cir. 2008), recently found that a negligent or erroneous response to a complaint

of harassment does not amount to deliberate indifference under Title IX. See also *Doe v. Dallas Indep. Sch. Dist*, 220 F.3d 380 (5th Cir. 2000) (holding that actions and decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference under *Davis*); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007) (noting "[i]n hindsight, there may be other and better avenues that the [district] could have explored . . . [b]ut Title IX does not require . . . flawless investigations [or] perfect solutions"); *Bd. of County Comm'rs of Bryan County, Okla v. Brown*, 520 U.S. 397, 407 (1997) (noting "[a] showing of simple or even heightened negligence will not suffice" under the deliberate indifference standard). *Wilson v. Beaumont Indep. School Dist.*, 144 F. Supp. 2d 690 (E.D. Tex. 2001)("Even assuming, however, that defendants could have taken swifter and more appropriate action, there is no legal requirement of perfection."); *Johnson v. Independent School Dist.*, 194 F. Supp. 2d 939, 948 (Dist. Minn. 2002)(perfect solutions to a complaint of sexual harassment is not required to avoid liability).

Although neither *Davis* nor *Vance* require schools to "remedy" or "purge" themselves of sexual harassment to prevail at the summary judgment level, and *Davis'* progeny allows room for error when responding to complaints of harassment, the Majority in this case found that when "a school district takes some action in response to known harassment, if further harassment continues," the school should not be shielded by summary judgment. P. 16. Moreover, the Majority went so far as to require schools to "prevent" future harassment by unidentified students from occurring before it can avoid liability. P. 17.

In coming to its conclusion, the majority relies upon the following additional language in *Vance*:

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

231 F.3d at 261.

The Majority seems to interpret these two sentences to mean that even if the school district takes disciplinary action in response to all known harassment, and even if that action is 100% effective against the individual harassers, it may be liable if there is subsequent harassment by new offenders. Such a proposition has been refuted. See *Doe v. Bellefonte Area School Dist.*, No. 4:CV-02-1463, 2003 U.S. Dist. LEXIS 25841, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), aff'd 106 Fed. Appx. 798 (3d Cir. Aug. 4, 2004). Such an interpretation also stands in stark contrast to the long line of precedent interpreting *Davis* and *Vance*, which find that actions and decisions by officials that are merely inept, erroneous, ineffective or negligent do not amount to deliberate indifference—findings which contemplate that future harassment has not been prevented.

Moreover, when examining the facts of *Vance*, it is apparent that *Vance* does not support such a conclusion either. The harassment in *Vance* was far

more egregious, and the response thereto was far less appropriate, than in this case. The student in *Vance* was subjected to widespread harassment and physical abuse. She was the victim of frequent and vulgar name-calling ("whore" and "gay girl," etc.), and she was touched inappropriately in almost every class. She was stabbed in the hand with a pen during one assault, and, on another occasion, two students held her down and tried to rip off her clothes while another student took off his pants and said that he was going to rape her.

After reports were responded to, the harassing conduct not only continued, but it increased. In fact, the **same** offenders confronted the minor plaintiff **after** they had been "talked to" specifically in order to harass her again. Even though "'talking to the offenders' produced no results, [the school] continued to employ this ineffective method." See *Vance*, 231 F.3d at 262.

It was this factual background which led this court to conclude that if a school district "has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances." *Id.* at 261. *Vance* thus confronted the situation where the harassing students re-offended after they were disciplined (i.e., discipline "produced no results"), yet the school knowingly continued to use the same ineffective method. In this case, it is undisputed that Petitioner effectively responded to every complaint of harassment, to the extent that once an complaint was addressed with an offending student, that student never bother Respondent again.

B. The Majority Opinion Below Is In Conflict With The Third Circuit When Confronted With the Same Fact Pattern

The Third Circuit has addressed a case with substantially similar facts as the case before the Court. However, the majority opinion below interpreted the deliberate indifference standard in view of those facts in conflict with the Third Circuit.

In *Doe v. Bellefonte Area School Dist.*, No. 4:CV-02-1463, 2003 U.S. Dist. LEXIS 25841, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), *aff'd* 106 Fed. Appx. 798 (3d Cir. Aug. 4, 2004), the Third Circuit addressed whether a school is deliberately indifferent where the school took action in response to reports of harassment that was one hundred percent effective to eliminate a repeat offense by an offending student, however, the school could not prevent future harassment by new unidentified students. The Third Circuit found, under these circumstances, the school was not deliberately indifferent.

In *Bellefonte,* the student was ridiculed and harassed by his fellow students for years. He was called "queer," "gay boy," "pixie," "faggot," and "peter-eater," among other things. He was pushed at school and physically assaulted at the bus stop. He reported some (but not all) of the bullying and harassment, and the school took varying degrees of disciplinary action when the harassment was reported. Some of the offenders were given verbal warnings and reprimands, some were counseled about the seriousness of the harassment, some were given detention, and others were suspended. Notably, every time the school warned or disciplined an offender, "that perpetrator

never bothered Doe again. The School District's method of dealing with specific, identified perpetrators involving Doe was one hundred percent effective." 2003 U.S. Dist. LEXIS 25841, 2003 WL 23718302, at *9. Based on the 100% success rate with the individual offenders, coupled with the school agreeing to be extra "vigilant" of the problems and having an anti-harassment policy, the district court granted summary judgment in favor of the school district because "no reasonable finder of fact could conclude that the School District was deliberately indifferent to the harassment of Doe, or that its responses to the harassment of which it was aware were clearly unreasonable." 2003 U.S. Dist. LEXIS 25841, [WL] at *9-10.

The complaints in this case closely mirror those in the above case, and Petitioner's response here at least equaled that of the school in *Bellefonte*. It has been acknowledged by the Majority Opinion below that Petitioner responded to every complaint of harassment effectively, to the extent that each reported offending student was punished, and the student never repeated his conduct. The Majority also acknowledged Petitioner instituted at least two programs in the school to teach the dangers of sexual harassment, and had in place policies prohibiting sexual harassment. A 449.

It is also undisputed that Petitioner responded to Respondent's complaints in additional ways, which the majority below ignores. For example, School counselor Susan Mansfield invited DP to attend both group and individual counseling sessions for students having problems with their peer relationships; Petitioner also took the unusual step of sending a school social worker and psychologist to DP's home to meet and evaluate

him during his (and their) summer break; Teachers agreed to be extra vigilant in looking out for DP; Teachers offered suggestions on how to help DP better cope with his peer-related problems, such as enrolling in extracurricular social programs like band, science olympiad, and other activities; DP was given seating preferences to avoid students with whom he might have problems; DP was referred to a social worker for counseling several times each month; Petitioner provided DP with an individualized evaluation program; DP's Principal offered to, and did, regularly meet with and counsel DP until DP stopped the sessions;) and Petitioner provided DP with a Resource Room.

It is clear that Petitioner went beyond "merely responding" to the complaints of harassment in a manner that is not "clearly unreasonable" as required by *Davis*. Yet, in conflict with the Third Circuit, the majority opinion below found that it was a question of fact whether Petitioner was deliberately indifferent to sexual harassment. Ultimately, the only way the majority avoided the conclusion that Petitioner responded appropriately was to ignore crucial facts as indicated above, substitute its own judgment for that of Petitioner's, and by redrawing the deliberate indifference standard.

C. The Majority's Opinion Is Impractical Considering The Unique Nature Of Schools, And Could Ultimately Have A Detrimental Affect On Schools

The effect of the majority's opinion - to require that schools prevent future harassment by unidentified harassers - is impractical, and impossible, in light of

the unique school environment. This Court has instructed:

> Courts must bear in mind that schools are unlike the adult work place in that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least earlier on, students are still learning how to interact appropriately with their peers. It, is, thus, understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing and gender specific conduct that is upsetting to the student subjected to it.

Davis, 526 U.S. at 651-52. Bad behavior is inevitable in schools, and even the most diligent school districts will have students who are frequently picked on or harassed.[5] By expanding the deliberate indifference standard to require schools to prevent future harassment by unidentified students, the Majority's opinion could finally result in the crushing financial blow the Dissent in *Davis* feared. 526 U.S. at 672.

Such a heightened standard could also negatively impact the student body. When a school accepts federal aid, it "weighs the benefits and burdens before

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[5] In schools that are large enough, it is entirely likely that a student could harass another student perceived to be an easy target, without knowing that the targeted student was previously harassed. Although the school would have no way of predicting this incident would occur, under the majority opinion's standard, the school would still be liable for this unpredictable act, even if the school effectively responded to each previously reported incident.

accepting the funds."[6] *Guardians Ass'n. v. Civil Service Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the burdens of accepting funds is to guarantee it will prevent recurrences of future harassment by unidentified students, in light of the challenges presented by the school environment, many school districts may simply forgo federal assistance, and the beneficial programs the aid funds. This may be especially true for smaller districts that receive relatively small amounts of federal funding. For

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[6] Congress enacted Title IX pursuant to its spending power. When this Court determined that a private right of action was implied in Title IX, it carefully crafted a high burden of proof for plaintiffs to prove a sexual harassment claim that comports with limits on Congress's Spending Clause Powers. These limits are rooted in part in the concept that:

> legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See Steward Machine Co. v. Davis, 301 U.S. 548, 585-598 (1937); Harris v. McRae, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. 13 Cf. Employees v. Department of Public Health and Welfare, 411 U.S. 279, 285 (1973); Edelman v. Jordan, 415 U.S. 651 (1974). By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).

example, in 2009, Petitioner received $195,000 in federal aid, which is only 2.4% of its revenue.[7] By comparison, Respondent has demanded more than $500,000 to settle this case. This heightened standard provides schools with a strong disincentive to accept federal funding. Surely Congress did not intend to discourage schools from accepting federal aid.

D. The Appropriate Standard for Deliberate Indifference

The pertinent inquiry should be whether the response was appropriate under the particular circumstances. A school responds appropriately if it investigates what has already occurred, reasonably tries to end any harassment still ongoing by the offenders, and seeks to prevent the identified offenders from engaging in such conduct again. That is exactly what happened in this case. It is manifestly unreasonable to hold that a school district may be responsible for not preventing future harassment by entirely separate and new harassers. To suggest otherwise, as the majority does, comes extremely close to requiring that schools be "purged" of all offensive behavior and be completely harassment-free, which the Supreme Court and Sixth Circuit have unequivocally held is not required -- or possible.

Whether the defendant, from an objective viewpoint, could have (or should have) done more to stop the harassment is not the appropriate inquiry. Lack of objective reasonableness, i.e., a failure to act as a reasonable person would have acted, does not by

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[7] http://www.hudson.k12.mi.us/board/budget.html

itself equal deliberate indifference. Nor does liability turn upon whether the school successfully remedied the harassment. The only question is whether the school "intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment," and whether its response was so "clearly unreasonable" and inadequate that it facilitated and subjected the student to harassment. Based on the undisputed facts in the record in this case, any reasonable juror would have to answer that question "No."

CONCLUSION

For the foregoing reasons, the Court should reverse the Sixth Circuit's Opinion that Petitioner was deliberately indifferent.

Respectfully submitted,

Timothy J. Mullins
Counsel of Record
Kenneth B. Chapie
Giarmarco, Mullins & Horton, PC
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7000

Counsel for Petitioner

APPENDIX

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0002p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-1008

[Filed January 6, 2009]

DAVID PATTERSON and DENA PATTERSON, *Plaintiffs-Appellants,*	)
v.	)
HUDSON AREA SCHOOLS and KATHY MALNAR, *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

No. 05-74439—Lawrence P. Zatkoff, District Judge.

Argued: October 23, 2008
Decided and Filed: January 6, 2009

Before: MOORE and WHITE, Circuit Judges; VINSON, District Judge.*

COUNSEL

ARGUED: Terry E. Heiss, LAW OFFICE OF TERRY E. HEISS, Ada, Michigan, for Appellants. Timothy John Mullins, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellees. **ON BRIEF:** Terry E. Heiss, LAW OFFICE OF TERRY E. HEISS, Ada, Michigan, for Appellants. Timothy John Mullins, GIARMARCO, MULLINS & HORTON, Troy, Michigan, for Appellees.

MOORE, J., delivered the opinion of the court, in which WHITE, J., joined. VINSON, D. J. (pp. 20-34), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiffs-Appellants David Patterson and Dena Patterson (collectively referred to as "the Pattersons"), appeal the district court's grant of summary judgment in favor of Defendant-Appellee Hudson Area Schools ("Hudson") on the Pattersons' claim that Hudson violated Title IX by allowing their son, DP,[1] to be

* The Honorable C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

[1] All individuals who were minors during the events described herein will be referred to by initials.

harassed by other students. The Pattersons' sole argument is that the district court erred in finding that, as a matter of law, Hudson was not deliberately indifferent to the alleged sexual harassment of DP.

Because we believe that the Pattersons have established that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the student-on-student sexual harassment of DP, we **REVERSE** the grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURE

Because this case involves a motion for summary judgment, we will detail the facts in the light most favorable to the nonmoving party, the Pattersons. DP was a student of Hudson schools during all relevant time periods. Beginning in 2002, during DP's sixth-grade year, various classmates of DP began teasing DP, calling him names, and pushing and shoving him in the hallways. DP was pushed into lockers and called names such as "queer," "faggot," and "pig" by various students on a daily basis. Joint Appendix ("J.A.") at 668-70 (DP Dep. at 28-30). DP reported at least some of these instances to the school and was told "kids will be kids, it's middle school." J.A. at 672 (DP Dep. at 33). DP also began receiving psychological treatment from Dr. Gretchen Warwick, Ph.D.[2] According to Dr.

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[2] Dr. Warwick also treated DP when he was ten years old for problems stemming from his family life. DP was no longer suffering from those problems when the teasing began in sixth grade.

Warwick, this harassment caused DP to be distraught, anxious, and angry.

The type of harassment DP faced in sixth grade escalated during DP's seventh-grade year, when he was called names such as "fat," "faggot," "gay," "queer," "pig," and "man boobs" on a daily basis. J.A. at 672-74 (DP Dep. at 33, 36-37). DP believes he was called these names more than 200 times during his seventh-grade year. He also was frequently pushed in the hallways. Additionally, DP was called "Mr. Clean" by his peers, a derogatory term that referred to DP's supposed lack of pubic hair.

On one occasion, DP attempted to stop a female classmate, BC, from tormenting another student. In response, BC slapped DP. Though, upon learning about the incident, band teacher Crystal Bough, told DP she "w[ould] take care of it," the Pattersons were never contacted by the school, nor did Ms. Bough report the incident to the principal. J.A. at 678-79 (DP Dep. at 44-45). The Pattersons learned from DP that he had been assaulted at school. This incident led to further teasing, including teasing from geography teacher John Redding, who asked DP later that same day in front of a full class of students: "[H]ow does it feel to be hit by a girl[?]" J.A. at 680 (DP Dep. at 46). The class laughed at DP.

DP wanted to quit school by the end of the first semester of seventh grade. Principal Greg Rozeveld[3] offered to mentor DP through this hard time. However,

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[3] The principal's name is repeatedly misspelled in Hudson's brief and the depositions as "Roosevelt."

according to Mrs. Patterson, when DP first began to meet with Principal Rozeveld, DP was released from class early to attend the meeting. The first visit went smoothly, but Principal Rozeveld was not in his office when DP arrived for the next three visits. On these occasions, DP would return to class, which caused the teacher to decide to stop sending DP early to meet with Principal Rozeveld. Instead, she waited until she released the problem students to go to the office to have their planners signed at the end of the school day. After only a couple of weeks, DP expressed to Mrs. Patterson that he no longer wanted to go with the problem students because other students were beginning to think he was a trouble-maker. DP stopped going to meet with Principal Rozeveld shortly thereafter.

These incidents caused DP to withdraw to the point that he began eating lunch in the bandroom by himself to avoid his tormentors. His interim grades were also low; however, DP did receive higher final grades.

The Pattersons and DP repeatedly reported several incidents of harassment to Hudson. As the district court accurately detailed, DP and the Pattersons reported the following incidents:

1. Sixth Grade:

    a. Dave Patterson spoke to a teacher about teasing directed at [DP] and how [DP] felt upset and humiliated.

    b. [The Pattersons] attended parent teacher conferences to talk about the name calling, etc.

c. [The Pattersons] met with Principal Rozeveld to discuss the pushing, shoving and name calling of [DP].

2. Seventh Grade:

a. [The Pattersons] and school counselor Susan Mansfield ("Ms. Mansfield") discussed the fact that [DP] was having a hard time at school in November and/or December, 2002.

b. [The Pattersons] and several teachers met to discuss [DP]'s anxiety about being (i) bullied and teased, (ii) the victim of sexually offensive name calling, and (iii) pushed into lockers.

c. [The Pattersons] met with Principal Rozeveld just before Christmas 2002 about [DP] not wanting to come back to school because of teasing, bullying, and being called "gay", "fag", "queer." [The Pattersons] also discussed the impact of those things on [DP]'s schooling, his feelings of being ostracized and his suffering grades. Names of perpetrators allegedly were provided. They also discussed the incident of [DP] being slapped by [BC] and Mr. Redding teasing [DP] about it.

d. During the second semester of seventh grade, [the Pattersons] discussed problems [DP] endured with Ms. Mansfield and other staff.

> e. [The Pattersons] communicated with school staff throughout [DP]'s seventh grade year over academic and social issues. The [Pattersons] asked staff what, if anything, [DP] was doing to cause his peers to tease and taunt him. [The Pattersons] claim that they were told consistently that [DP] was doing nothing wrong.

Patterson v. Hudson Area Schools, No. 05-74439, 2007 WL 4201137, *1-2 (E.D. Mich. Nov. 28, 2007) (unpublished opinion and order).

During the summer between seventh grade and eighth grade, Ms. Mansfield, along with social worker Tammy Cates, filled out a referral form to have DP evaluated for special education services. This evaluation established that DP is emotionally impaired as defined by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. An Individual Education Placement Team was convened and an individual education program was developed. Pursuant to the program, DP was assigned to attend teacher Ted Adams's resource room during one period of the day for all of the eighth-grade year. Mr. Adams was helpful in teaching DP how to cope with his peers. All parties agree that DP had a successful eighth-grade year; by using the resource room, DP was able to learn effectively.

However, DP's ninth-grade year was not successful. DP's individual education program was altered by Hudson. Notably, Hudson High School Principal Michael Osborne refused to allow DP to continue in Mr. Adams's resource room because Mr. Adams was a

middle-school resource-room teacher. Because DP's eighth-grade year was so successful, the Pattersons begged Hudson to allow DP to continue in Mr. Adams's resource room, and even offered to have DP go to the middle school to meet with Mr. Adams in Mr. Adams's room, but this request was to no avail.[4] Principal Osborne also "didn't think that [the high school resource room] was the place for [DP]." J.A. at 856 (Mrs. Patterson Dep. at 138). Thus, DP was not placed in any resource room for his ninth-grade year.

The beginning of his ninth-grade year brought a return of the type of harassment DP faced in sixth and seventh grade. DP was again called names such as "gay," "fat," "fag," and "queer" and was pushed and shoved in the hallways on a near daily basis. J.A. at 729-30 (DP Dep. at 106-07). That fall, DP also was called "Mr. Clean" by three students. Those students were forced to meet with DP and Ms. Mansfield. The students apologized, but DP did not think their apology was sincere. Those three students never bothered DP again.

DP also experienced new types of harassment during his ninth-grade year. During oral presentations in history class, a fellow student, SE, wrote a series of words on the back of his note cards. These words created the phrase: "[DP] is a fag." J.A. at 708 (DP

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[4] Though Mr. Adams worked for the middle school, the middle school and high school are housed in the same building, segregated into separate wings. According to DP, it was possible for him to stop by and meet with Mr. Adams in Mr. Adams's room even after DP began high school. Mr. Adams did volunteer to counsel DP for 25-30 minutes per week after DP began his ninth-grade year.

Dep. at 85). The entire class saw this phrase as the student used the cards for his presentation, which caused the students to laugh at DP. SE was reported to Ms. Mansfield and the history teacher, both of whom verbally reprimanded SE. SE never bothered DP again.

Shortly after the oral presentation incident, another student, JR, defaced DP's planner with the sexual phrases "I ❤ penis," "I lick it in the Ass," "I ❤ cock," and "I'm a mamma's boy/I suck on her Nipple" and drawings of buttocks and a penis. J.A. at 311 (Planner); J.A. at 721-24 (DP Dep. at 98-101). DP reported this incident to both the teacher and Principal Osborne. JR was verbally reprimanded by Ms. Mansfield and did not bother DP again after this incident.

In March 2005, unknown students broke into DP's gym locker, removed his clothes and urinated on them, and threw his tennis shoes in the toilet. The locker was also "covered with shaving cream spelling out sexually oriented words." J.A. at 152 (TW Aff. ¶ 14). Later that spring, two students, KM and JL, hung a "Mr. Clean" poster on DP's locker in the main hallway. Principal Osborne verbally reprimanded KM, and suspended JL for one day. JL's tougher punishment was due to the fact that he had previously violated school rules in a manner unrelated to the "Mr. Clean" incident. Neither student bothered DP thereafter.

At some point after the "Mr. Clean" incident, DP's locker in the main hallway was vandalized by unknown students. These students used permanent markers and wrote words such as "gay," "faggot," and "queer" up and down the locker. J.A. at 805 (Mr.

Patterson Dep. at 55). Additionally, a picture of a penis being inserted into a rectum was drawn on the locker. The inside of the locker was also defaced with various derogatory phrases, such as "suck your mother's tits" and "you suck dicks." *Id.* After the Pattersons reported the incident, Hudson officials cleaned the outside of the locker; DP had to ask Mr. Adams to help him clean the inside of the locker. Hudson conducted an investigation, but no individuals were ever punished.

The final incident of harassment occurred in late May 2005. After Friday night junior-varsity baseball practice, DP was sexually assaulted by a fellow teammate, LP, in the locker room. LP stripped naked, forced DP into a corner, jumped on DP's shoulders, and rubbed his penis and scrotum on DP's neck and face. While the assault was occurring, another student, NH, blocked the exit so DP could not escape. DP informed the Pattersons that evening about the attack. DP also informed Andy Wade, his older brother and coach of the junior-varsity baseball team. The Pattersons informed Principal Osborne about the event on Saturday, during a baseball double-header. Both DP and LP played in the double-header, but DP claims he participated in the game only in order to prevent the team from having to forfeit.

LP was allowed to attend school on Monday morning while Hudson officials began investigating the incident. At some point on Monday, LP was suspended for the remainder of the school year (just over eight days). However, LP was permitted to attend the annual spring sports banquet, one week after the assault. Principal Osborne told Mr. Wade "to treat [LP] like any other player, to shake his hand as [Mr. Wade] would other players and to act like nothing

happened." J.A. at 233 (Wade Aff. ¶ 23). On June 10, 2005, LP was charged with assault with intent to commit a felony and criminal sexual conduct in the second degree. He ultimately pleaded guilty to disorderly conduct. He was formally expelled from Hudson in August 2005 and has not been permitted to re-enter the Hudson school system. NH was verbally reprimanded for his role in the assault. No criminal charges were filed against NH.

After the sexual assault, the varsity baseball coach, Jeremy Beal, held a team meeting with both the junior varsity and the varsity baseball players. At the meeting, Mr. Beal informed the players that they should "'not joke around with guys who can't take a man joke.'" J.A. at 153 (TW Aff. ¶ 24 (quoting Mr. Beal)). DP was present at the meeting.

Due to the continued harassment at Hudson, culminating in a sexual assault, DP claims that he has been psychologically unable to set foot into a Hudson school building since the end of his ninth-grade year. At the end of ninth grade, DP's individual education program was modified. For his tenth-grade year, "[DP] began receiving instructional services from [Hudson] in the Sacred Heart School building," a preschool-through- sixth-grade Catholic elementary school. J.A. at 160 (Johnston Aff. ¶ 36). DP's high-school teachers would visit him occasionally to discuss his assignments, even though "[DP] made numerous attempts to e-mail teachers and did not get responses." J.A. at 157 (Johnston Aff. ¶ 17). This year was not successful for DP.

For his eleventh- and twelfth-grade years, Hudson allowed DP to take college placement courses at the

local college. Originally, Hudson decided that one semester of college coursework would equal one semester of high school course work. However, after Hudson was required to pay tuition, "[t]he standard changed to one semester college class equals one year high school class . . . ." J.A. at 197 (Mrs. Patterson Aff. ¶ 7). This facilitated DP's early graduation.

The Pattersons filed suit against Hudson and Kathy Malnar, Superintendent of Schools for Hudson, in the United States District Court for the Eastern District of Michigan on November 22, 2005. The complaint alleged the following federal claims: (1) Hudson violated Title IX of the Education Amendments of 1972; (2) Hudson violated DP's equal-protection rights; and (3) Ms. Malnar "failed to implement and enforce meaningful procedures to ensure compliance with federal law and the policies of [Hudson] and failed to ensure the proper education and training of staff as to harassment issues." J.A. at 17 (Compl. ¶¶ 28-30). The complaint also alleged various state claims.

Hudson and Malnar moved for summary judgment with respect to all claims, which the district court granted. *Patterson*, 2007 WL 4201137, at *13. With respect to the Title IX claim against Hudson,[5] the district court applied the three-part test expressed in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), as articulated by this court in *Vance v.*

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[5] The district court dismissed the Title IX claim against Superintendent Malnar with the observation that "there is no individual liability for a Title IX claim." *Patterson*, 2007 WL 4201137, at *5 n.2. The Pattersons do not appeal this dismissal.

Spencer County Public School District, 231 F.3d 253 (6th Cir. 2000). *Patterson*, 2007 WL 4201137, at *12. The district court determined that the Pattersons had met their burden with regard to the first two parts of the test, but that the Pattersons failed to show, as a matter of law, that Hudson's responses to DP's reported attacks were "clearly unreasonable in light of known circumstances." *Id.* The district court concluded that, absent such a showing, the Pattersons could not prove that Hudson was "deliberately indifferent to the alleged sexual harassment," and thus summary judgment was appropriate. *Id.* The district court stressed that each time DP or the Pattersons reported an incident and Hudson knew who the perpetrators were, Hudson reprimanded or punished those individuals, who later did not bother DP. *Id.* at *8-9. The district court further credited Hudson with implementing several proactive programs to combat harassment and bullying and with "assist[ing DP] in dealing with the issues he faced in their schools." *Id.* at *10. The Pattersons timely appealed, arguing only that the district court erred in determinating that, as a matter of law, Hudson was not deliberately indifferent. Thus, on appeal, we consider only the Title IX claim against Hudson.

II. ANALYSIS

A. Summary Judgment Standard of Review

We review de novo a district court's grant of summary judgment. *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir. 2004). Under Rule 56(c), summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact

and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "In deciding upon a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the non-moving party." *Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). "'We examine the grant of summary judgment to determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *DiCarlo*, 358 F.3d at 414 (quoting *C.T. Massey v. Exxon Corp.*, 942 F.2d 340, 342 (6th Cir.1991)) (second set of internal quotation marks omitted).

B. Title IX Claim

Title IX provides that, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681. Title IX can support a cause of action for a student's claim of student-on-student sexual harassment against a recipient of federal funds. *Davis*, 526 U.S. at 633. To establish a prima facie case of student-on-student sexual harassment, the plaintiff must demonstrate each of the following elements:

(1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,

(2) the funding recipient had actual knowledge of the sexual harassment, and

(3) the funding recipient was deliberately indifferent to the harassment.

Vance, 231 F.3d at 258-59 (quoting *Soper v. Hoben*, 195 F.3d 845, 854 (6th Cir. 1999) (citing *Davis*, 526 U.S. at 633)).

The district court found that the Pattersons met their burden with regard to parts one and two of the test, but that, as a matter of law, the Pattersons did not establish that Hudson was "deliberately indifferent to the alleged sexual harassment against [DP]." *Patterson*, 2007 WL 4201137, at *12. The only issue on appeal is whether Hudson's actions require us to hold, as a matter of law, that Hudson has not acted with deliberate indifference. We conclude that, viewing the evidence in the light most favorable to the Pattersons,[6]

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[6] This is a diametrically different approach than the one taken by the dissent. Although the dissent professes to be using the correct legal standard, it repeatedly weighs evidence and decides controverted issues in favor of Hudson, the moving party. *See, e.g.*, Dissent at 24-25 (deciding that the resource room is nothing more than "the equivalent of study hall" and, therefore, could not cause a reduction of harassment); 25-26 (belittling the Pattersons' evidence in regard to the lack of and effectiveness of proactive programs). When we review a grant of summary judgment, we are forbidden to weigh the evidence or to draw the inferences the dissent insists upon drawing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are *jury functions*, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable

inferences are to be drawn in his favor." (emphasis added)). Our job is to look at the facts and consider them in the light most favorable to the nonmoving party, regardless of our own personal views of how much credence we would give a particular piece of evidence if we were on a jury. The dissent's steadfast determination to act as a juror is contrary to Supreme Court precedent.

A clear example of the dissent's misunderstanding and misapplication of the governing standard is found in the assertion that the undisputed facts support a conclusion that the resource room itself did nothing to reduce the harassment of DP. The record clearly shows and both parties admit that, when the resource room was used, DP suffered less harassment. Whether it was the use of the room or the person who ran the room that caused this undisputed decreased harassment is a question of interpretation. Because we must draw all inferences in favor of the nonmoving party, it is legally incorrect for the dissent to infer that Mr. Adams himself, and not the use of the resource room in general, aided DP. This same evidence supports the inference that it was the use of the resource room itself that was beneficial to DP and, because that inference favors the Pattersons, that is the inference the Supreme Court demands we draw. The dissent's repeated claim, unsupported by the record, that all the inferences it draws in Hudson's favor are "established by the undisputed facts," *see, e.g.*, Dissent at 24, does not magically give the dissent carte blanche to view controverted issues in the light most favorable to Hudson.

Furthermore, even assuming that the inference that the dissent insists upon drawing was legally permissible, we believe that a reasonable juror could still find that Hudson was deliberately indifferent. Although Mr. Adams worked for the middle school, the middle school and the high school were housed in the same building, "connected by a short hall." J.A. at 697 (DP Dep. at 74). DP testified that, during his ninth-grade year, it was possible for him to meet Mr. Adams on the same basis he did while in middle school. Additionally, Mrs. Patterson testified that the Pattersons "begged" Hudson to allow DP to meet with Mr. Adams and even offered to have DP meet with Mr. Adams in Mr. Adams's room in the middle school. J.A. at 855 (Mrs. Patterson Dep. at 137). Given the effectiveness of the eighth-grade resource

the Pattersons have demonstrated a genuine issue of material fact regarding whether Hudson's actions were deliberately indifferent.

A recipient of federal funds that remains "deliberately indifferent to known acts of harassment" is liable for damages under Title IX. *Vance*, 231 F.3d at 260. "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* (quoting *Davis*, 526 U.S. at 645) (first alteration in *Vance*, second alteration in *Davis*). "[A] plaintiff may demonstrate [a] defendant's deliberate indifference to discrimination 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). A recipient need not "[purge its] schools of actionable peer harassment" or "engage in particular disciplinary action" to avoid Title IX liability. *Vance*, 231 F.3d at 260. "Furthermore, courts should not second guess the disciplinary decisions that school administrators make." *Id.* at 260. However:

> where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. *Where a school district has actual knowledge that its efforts to remediate are ineffective, and*

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room and the willingness of the Pattersons to have DP go back to the middle school to utilize Mr. Adams's services, a reasonable juror could conclude that Hudson's refusal to continue the resource room program for DP constitutes deliberate indifference.

> *it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.*

Id. at 261 (emphasis added).

Relying on this language, one district court determined that, where a student suffered four years of harassment from various other students, a school district's "tactic of merely talking to and warning students who harassed plaintiff," with occasional investigation into "some of the more significant incidents and even eventually proactively sp[eaking] to students and teachers in an effort to prevent further incidents . . . raised a genuine issue of material fact sufficient to withstand summary judgment." *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966 (D. Kan. 2005). *Theno* is illustrative. In *Theno*, the plaintiff was repeatedly harassed beginning in his seventh-grade year and ending only when he left school during his eleventh-grade year. *Id.* at 954-61. The harassment consisted of name calling ("faggot," "queer," "pussy," "jack-off boy," etc.), persistent joking regarding plaintiff being caught masturbating in the school bathroom (which was untrue), and some physical altercations (pushing, shoving, tripping, fistfights). *Id.* Most student harassers were merely given verbal warnings or reprimanded by the school; however, a few of the more serious offenders were more severely disciplined. *Id.* Importantly, "each time the school disciplined a known harasser, to the best of the school's knowledge that particular harasser ceased harassing plaintiff (with limited exceptions)." *Id.* at 965. The school also began to speak proactively with students and teachers regarding harassment during the plaintiff's tenth-grade year. *Id.* at 959-60.

The school district in *Theno* argued that, as a matter of law, its responses could not be deemed clearly unreasonable. *Id.* at 965. The district court disagreed, stressing that

> this is not a case that involved a few discrete incidents of harassment. It involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped, and the school rarely took any disciplinary measures above and beyond merely talking to and warning the harassers.

Id. at 966. Though the school took more aggressive measures in the later years of the harassment, the district court noted that

> [b]y that time, the harassment had been going on for a number of years without the school handing out any meaningful disciplinary measures to deter other students from perpetuating the cycle of harassment. While the court recognizes that the school was not legally obligated to put an end to the harassment, *a reasonable jury certainly could conclude that at some point during the four year period of harassment the school district's standard and ineffective response to the known harassment became clearly unreasonable.*

Id. (emphasis added). The district court cited *Vance* to support this determination. *Id.* It also concluded that *Vance* supported a finding that "whether the school's belatedly stepped-up efforts were 'too little, too late' is a question for the jury." *Id.*

Theno's reliance on *Vance* is persuasive.[7] In *Vance*,

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[7] Contrary to the dissent's assertion, we rely on *Vance* in making our holding. However, one cannot escape the striking similarities between the instant case and *Theno*, a case that also relied on *Vance*. The dissent's attempt to minimize the usefulness of district court opinions does not change this fact. We therefore believe that *Theno* is a helpful tool to illustrate why the holding in *Vance* supports our holding today.

More important, the case the dissent cites as "very similar and persuasive," Dissent at 29, *Doe v. Bellefonte Area School District*, 106 F. App'x 798 (3d Cir. 2004), an unpublished Third Circuit opinion, is different from this case in two material respects. First, in *Doe*, the school district did more to prevent the systematic harassment of Doe than Hudson did in instant case. Specifically, the school district gave Doe "a special means of reporting any additional harassment," circulated memoranda specific to Doe's harassment issues to the faculty in the hopes of preventing future harassment, and "held assemblies and enacted policies addressing peer-to-peer harassment." *Doe*, 106 F. App'x at 800. As outlined above, when viewing the facts in the light most favorable to the Pattersons, we observe that Hudson did not perform any of these services during DP's ninth-grade year. Thus, *Doe* is distinguishable from the instant case by the effort the school district devoted to preventing future harassment.

Second, and of greater weight, is the fact that the Third Circuit is not bound by *Vance*, and thus *Doe* is of little value. Moreover, the dissent's contention that *Doe* tacitly rejected our interpretation of *Vance* is unavailing, given that the actual opinion in *Doe* makes no mention of *Vance*. Therefore, even if the *Doe* panel thoroughly considered and rejected this interpretation of *Vance*, *Doe* provides no reasoning regarding why it hypothetically rejected that interpretation that we may consider and evaluate.

Furthermore, the dissent's assertion that "a decision of a three-judge panel from a sister court of appeals has to be more persuasive than a single district judge's opinion from outside this circuit," Dissent at 29 n.7, is completely unfounded and demeaning to district court jurists. Under such a theory, a decision from Learned Hand while sitting on the bench in the

Southern District of New York would be categorically inferior to any differing opinion rendered by a random three-judge panel from any circuit. Judges and cases differ, and such a bright-line rule that imports inferiority without regard to the depth of analysis present in an opinion or to the similarity of facts with the case at bar is unwarranted and disrespectful to the numerous talented district judges.

Additionally, the dissent's reliance on *S.S. v. Eastern Kentucky University*, 532 F.3d 445 (6th Cir. 2008), is misplaced. *S.S.* involved a student claiming peer-on-peer harassment in violation of the Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The panel applied the *Davis* test to the claim and held that the school district was not deliberately indifferent as a matter of law. However, the school district in *S.S.*, like the school district in *Doe*, did more than Hudson did in this case to prevent future harassment: The school district "arrang[ed] for outside speakers to talk to the students about name-calling, identif[ied] related topics for discussion at school assemblies and in small groups," "call[ed] the police," and "call[ed] the other students' . . . parents to discuss the disciplinary problems." *S.S.*, 532 F.3d at 455. The dissent insists that both *Doe* and *S.S.* are factually identical to this case, claiming that Hudson has done everything that the school districts in those two cases have done. Dissent at 29-33 & n.8. However, that is true only if one views the evidence in the light most favorable to Hudson, not when one views the evidence in the light most favorable to the Pattersons. Because the latter is the legally correct view, Hudson is not on par with the school districts in *Doe* and *S.S.*

Moreover, the panel in *S.S.* stressed that "[e]ven viewing the record in the light most favorable to S.S., proof is lacking as to what [the defendant] could have or should have done differently in order to bring the peer-on-peer harassment to a stop." *Id.* As explained below, that is not the case in the instant appeal; it is undisputed that Hudson was fully aware that use of the resource room in eighth grade impacted the amount of harassment that DP suffered and discontinuing the resource room in ninth grade correlated with a return to high levels of harassment. Hudson Br. at 8-22. Thus, a reasonable jury could find that Hudson knew how to combat the harassment of DP and simply chose not to implement that known method of success. Thus, *S.S.* is distinguishable.

when confronted with a post-trial motion for judgment as a matter of law, the district court upheld the jury verdict in favor of the plaintiff, a female student who suffered harassment over many school years perpetrated by various students, and we affirmed. *Vance*, 231 F.3d at 256-58. The school district responded to the plaintiff's harassment complaints by talking to the perpetrators, to no avail. *Id.* at 262. We rejected the defendant's argument that a school district is not deliberately indifferent "as long as a school district does something in response to harassment," *id.* at 260, emphasizing that "once [a school district] had knowledge that its response was inadequate, it was required to take further reasonable action in light of the circumstances to avoid new liability," *id.* at 262. We believe this language makes clear that, even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable. We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student. Such a situation raises a genuine issue of material fact for a jury to decide.

Furthermore, when viewing the facts in the light most favorable to the Pattersons, we conclude that there are striking similarities between the instant case and *Theno*. Here, as in *Theno*, DP was repeatedly harassed over a number of years. Hudson responded to this harassment largely by giving verbal reprimands to the perpetrators. Though typically reprimands

largely stopped harassment by the reprimanded student, they did not stop other students from harassing DP. This pervasive harassment escalated to criminal sexual assault. Moreover, Hudson was aware that the verbal reprimands regarding a few students were not stopping the overall harassment of DP; it is undisputed that DP continued to have problems with other students, even after some were reprimanded or even disciplined, and DP reported those continuing problems to Hudson. Hudson Br. at 8-22 (detailing DP's reported harassment).

One key difference between *Theno* and this case is that Hudson did at one point employ a system that successfully combated the harassment of DP, i.e., the use of the resource room during eighth grade. In the instant case, a reasonable jury could thus conclude that Hudson not only was aware of what did not work, but also was aware of what had worked to insulate DP from the harassment. However, in ninth grade, Hudson discontinued the use of the resource room. The cycle of harassment then intensified, and Hudson's only response was to employ the same type of verbal reprimands that it had used unsuccessfully in response to the sixth- and seventh-grade harassment. Given that Hudson knew that its methods were ineffective, but did not change those methods, "a reasonable jury certainly could conclude that at some point during the . . . period of harassment[,] the school district's standard and ineffective response to the known harassment became clearly unreasonable." *Theno*, 377 F. Supp. 2d at 966.

Hudson makes several arguments claiming that its actions were not clearly unreasonable as a matter of law, none of which are persuasive. Notably, Hudson

does not attempt to distinguish *Theno* from the instant case, but rather cites four different district court cases it believes are more instructive. Each of these cases is distinguishable from the instant case or espouses law contrary to our precedent.[8]

The thrust of Hudson's argument is that Hudson dealt successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law. This argument misses the

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[8] *Johnson v. Independent School District No. 47*, 194 F. Supp. 2d 939 (D. Minn. 2002), involved an inappropriate phrase ("one time at band camp") placed next to a picture in the school yearbook of plaintiff playing her flute. *Id.* at 941-43. When the school became aware of the sexual nature of the phrase, it attempted to cover the phrase with nonremovable stickers, a technique that was successful in the past. *Id.* at 942-43. Unfortunately, the stickers proved to be easily removable. *Id. Johnson* is distinguishable from the instant case because Hudson, when confronted with harassment of DP in ninth grade, implemented a system that it knew from past experience did not work.

Hudson also cites *Johnson* and *Wilson v. Beaumont Independent School District*, 144 F. Supp. 2d 690 (E.D. Tex. 2001), for the proposition that so long as a school district takes some action, that is enough to show that the school district was not deliberately indifferent. Hudson Br. at 30-31. We rejected this proposition in *Vance*. *Vance*, 231 F.3d at 260.

Finally, Hudson cites *KF's Father v. Marriott*, No. CA 00-0215-C, 2007 WL 228353 (S.D. Ala. Feb. 23, 2001), and *Vaird v. School District of Philadelphia*, No. CIV. A. 99-2727, 2000 WL 576441 (E.D. Pa. May 12, 2000), as examples of what does not constitute deliberate indifference; however, these cases are both distinguishable because both involved only one perpetrator, not harassment by several individuals aimed at a single student. *KF's Father*, 2007 WL 228353, at *16; *Vaird*, 2000 WL 576441, at *1.

point.[9] As explained above, Hudson's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law. *Theno*, 377 F. Supp. 2d at 966. It is for a jury to decide whether Hudson's actions were "clearly unreasonable." *Davis*, 526 U.S. at 649.

Hudson also asserts that it proactively dealt with the issue of harassment and bullying through a sexual-harassment policy in the student handbook, from which teachers and students were instructed, and school-wide programing dealing with harassment and bullying. However, viewing the facts in the light most favorable to the Pattersons, we cannot consider any of Hudson's claimed programs.[10]

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[9] The dissent likewise misses this point. On four separate occasions, the dissent claims that Hudson was "100% effective" in dealing with the harassment of DP. Dissent at 22, 28, 29, 33. However, one can make such a statement only if he ignores the realities of DP's situation. The reprimands of a few individual harassers did not stop harassment by the many, and it is undisputed that Hudson was aware of this fact. Hudson Br. at 8-22 (detailing DP's reported harassment). *Vance* teaches that, in such circumstances, a jury may legally find that a school district has "failed to act reasonably in light of the known circumstances." *Vance*, 231 F.3d at 261.

[10] First, the Pattersons presented evidence that the sexual-harassment policy was not explained to every student and teacher. *See, e.g.*, J.A. at 145 (Kline Aff. ¶ 10); J.A. at 228 (Wade Aff. ¶¶ 9.a-9.b). Second, of the programs listed by Hudson—"Character Counts," "40 Developmental Assets," "Bang, Bang, You're Dead," the speakers series, the individual and group counseling sessions, "Flirting and Hurting Program," "Concerned

Although Hudson's brief and oral argument before us attempted to minimize the harassment suffered by DP, Hudson does not argue that the district court improperly found that the Pattersons had met their burden of showing that the harassment of DP was severe and pervasive. Thus, we do not consider this issue. Therefore, we hold that, because Hudson had knowledge that its methods for dealing with the overall student-on-student sexual harassment of DP were ineffective, but continued to employ only those methods, the Pattersons have shown a genuine issue of material fact as to the third part of the *Davis* test that is sufficient to defeat Hudson's motion for summary judgment.

About Teen Sexuality ('CATS') Program," "Peer Mediation Program," and "Positive Peers"—the only ones that actually dealt with student-on-student sexual harassment and bullying (as opposed to sexual relationships between males and females) and were actually implemented were "Bang, Bang, You're Dead" and "Flirting and Hurting." *See* J.A. at 285 (Stutzky Aff. ¶ 7.c.vii); J.A. at 493-98 (Mansfield Dep. at 27-32). Third, the Pattersons' expert explained that one-time events such as "Bang, Bang, You're Dead," "no matter how powerfully presented, have not been demonstrated to have a significant lasting impact on a school's climate or culture or reducing or eliminating bullying or harassment." J.A. at 285 (Stutzky Aff. ¶ 7.c.viii). Fourth, the Pattersons presented evidence that the "Flirting and Hurting" program was not always taught to students. *Compare* J.A. at 228-230 (Wade Aff. ¶¶ 9 and 9.e) (stating that Wade taught health during the 2004-2005 school year and did not teach the "Flirting and Hurting" program), *with* J.A. at 495-97 (Mansfield Dep. at 29-31) (explaining that "Flirting and Hurting" was integrated into health classes in the 2003-2004 school year). Thus, when viewing these programs in the light most favorable to the Pattersons, we must assume that Hudson was not engaged in any proactive activities.

We emphasize that, at this stage of the litigation, the Pattersons are not required to prove that Hudson is actually liable for the continued harassment of DP (i.e., that Hudson's actions were clearly unreasonable), but only that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the harassment. In other words, the Pattersons must show only that a reasonably jury *could* find that Hudson violated Title IX. Viewing the facts in the light most favorable to the Pattersons, we believe the Pattersons have met this burden.

III. CONCLUSION

Because we conclude that the Pattersons have demonstrated that there is a genuine issue of material fact as to whether Hudson's responses to DP's reported student-on-student sexual harassment were clearly unreasonable in light of the known circumstances, we **REVERSE** the grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.

DISSENT

VINSON, District Judge, dissenting. I disagree. The single issue in this appeal is whether there is a genuine issue of material fact as to whether the defendant, Hudson Area Schools, was deliberately indifferent to the harassment directed at DP. A school district is not deliberately indifferent unless it knows of and disregards an excessive risk to the student's health or safety. *See Farmer v. Brennan*, 511 U.S. 825,

837, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994).[1] It must be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and, further, it must actually draw that inference. *See id.* Deliberate indifference presupposes that the school knows of a Title IX violation, but it "refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998); *see also, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999) (deliberate indifference established when school district knows of peer harassment, but it "refus[es] to take any action" and "ma[kes] no effort whatsoever" to end the harassment); *accord Horner v. Kentucky High School Athletic Ass'n,* 206 F.3d 685, 692 (6th Cir. 2000) (noting that deliberate indifference is shown when "school officials are aware of the misconduct *but do nothing to stop it. . .*") (emphasis added).

This standard "does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to [the] abuse." *See Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 508 (6th Cir. 1996). Ultimately, a Title IX recipient is deliberately indifferent to peer-on-peer harassment "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *See Davis, supra,*

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[1] *Farmer* is an Eighth Amendment prisoner case, but the standard is "applicable to the school context." *Williams ex rel. Hart v. Paint Valley Local School Dist.*, 400 F.3d 360, 368 (6th Cir. 2005).

526 U.S. at 648. The response must be of such a degree that it facilitated or "subjected" the victim to harassment. *See id.* at 644-47. Although this is a sad case, the plaintiffs have clearly not met the high legal standard for deliberate indifference. *See Gebser, supra,* 524 U.S. at 304 (Stevens, J., dissenting) (noting that only "few Title IX plaintiffs . . . will be able to recover damages under this exceedingly high standard").[2]

The relevant inquiry in determining whether the school district was deliberately indifferent is to examine its responses to the *known* instances of harassment. DP claims that he was harassed almost every day, but the record reflects that he did not report

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[2] The Supreme Court has emphasized that courts "must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers." *See Davis, supra,* 526 U.S. at 651 (citation omitted). I do not minimize the harassment at issue for it was very serious, but it appears that at least some of DP's peer-related problems were caused by his heightened sensitivity to the unfortunate reality that "in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *See id.* at 651-52. According to his teachers, DP was at times highly sensitive and had poor social skills which made it difficult for him to "distinguish[] between camaraderie and being picked on," which, in turn, alienated him from the other students. *See* Joint Appendix ("J.A.") at 553-54; *accord id.* at 102. It should be noted that these socialization and peer-related problems existed long before he entered the Hudson school district, apparently even dating back to daycare. *See id.* at 532.

much of the harassment.[3] When he did report the harassment at times throughout the years, he sometimes could not identify the harassers.[4] Obviously, the school district is not responsible for failing to stop harassment of which it was not made aware, nor can it be held responsible for failing to punish harassment by unknown individuals.

When DP complained and the harassers were identified, however, the defendant responded to each incident with action appropriate to the nature and severity of the harassment. The students who called DP "Mr. Clean" were taken to the school counselor's office for a meeting with DP, where they were counseled and then apologized. The student who wrote the offensive remarks on the back of his note cards was swiftly reprimanded and he, too, apologized. The student who defaced DP's planner was orally reprimanded, while a student who taped the "Mr. Clean" poster to his locker was suspended from school for one day. With respect to the locker room assault after baseball practice, NH was reprimanded and his parents were notified (even though DP told the authorities that NH was only "playing around"), and

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[3] To point to one example, the majority states that DP was teased, called names, and pushed and shoved "on a daily basis" while he was in the sixth grade. Maj. Op. at 2. Despite the daily nature of this harassment, DP admits that he made only "a total of a couple reports regarding [the] incidents that took place" during that school year: one or two reports to Principal Greg Rozeveld and teacher Gwen Marry. *See* J.A. at 648.

[4] DP was unable to say, for example, who vandalized his hall locker. The school conducted an investigation into the matter, as the majority acknowledges, *see* Maj. Op. at 7, but it was unable to determine who was responsible.

LP was suspended for the rest of the school year, criminally prosecuted, and formally expelled. Significantly, as the district court observed, and as the majority appears to recognize, no identified perpetrator ever harassed or caused problems for DP after being disciplined by the school. There were no repeat offenders, so the only reasonable conclusion from the undisputed facts in the record is that the school's actions, with respect to those offenders, were 100% effective.[5]

In addition to investigating all the reported claims of harassment and punishing the offenders so that they never once re-offended, the defendant took additional steps to help DP. For example, his science teacher, Ted Adams, agreed to be extra vigilant in looking out for him. *See* J.A. at 825. DP's mother testified that this gave her "a new sense of relief" because "Mr. Adams was always in the hall watching for [DP], keeping an eye out for him." *Id.* Other teachers agreed to keep watch on him as well. *Id.* at 761, 813. Another of his teachers offered suggestions on how to help DP better cope with his peer-related problems, such as enrolling in extracurricular social

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[5] The incident that took place in the seventh grade when DP intervened in a dispute between two female students and, in the process, was slapped by one of the girls, *see* Maj. Op. at 3, does not give rise to an inference of deliberate indifference. He told the teacher what occurred, but he claims that nothing was done. Assuming that to be true, it is apparent that the slap was unrelated to the type of harassment at issue in this case. By his own testimony, DP was not the intended victim --- he got involved because he was defending the other girl --- nor does it appear that this incident was in any way related, or similar, to the harassment which is the subject of this litigation. Indeed, he never had any other problems with the girl. *See* J.A. at 677-79.

programs like band, science olympiad, and other activities. *Id.* at 525, 817. School counselor Susan Mansfield invited DP to attend both group and individual counseling sessions for students having problems with their peer relationships. *Id.* at 470-71. The school district also took the unusual step of sending a school social worker and psychologist to his home to meet and evaluate him during his (and their) summer break. *Id.* at 374, 570. He was given extra time to take his exams, he was given seating preferences to avoid students with whom he might have problems, and he was referred to a social worker for counseling several times each month. *See id.* at 42. The school provided DP with an individualized evaluation program following his ninth grade year. He earned As and Bs, and, as part of his curriculum, he took college courses (at school district expense) which allowed him to take advanced classes, to become fluent in Japanese, and to graduate early from high school.

The school took additional steps that warrant closer review and discussion. First, Principal Greg Rozeveld offered to meet DP every day to provide assistance while he was in middle school, but the majority seems to fault the school district for the timing and circumstances under which these meetings occurred. *See* Maj. Op. at 3-4. When DP was in the seventh grade, the Pattersons spoke to Principal Rozeveld and told him that they were planning to withdraw DP from school. The parties had a very long meeting during which, according to Ms. Patterson, Mr. Rozeveld said that he "really hated to lose the good ones, the good kids," and he asked if there was "anything he could do to help." He offered to meet and counsel DP every day and "start interceding himself." DP's mother explained that Principal Rozeveld offered to meet with DP for

two interrelated reasons: he wanted to help him academically, and he wanted to "build[] the trust" so that DP would not feel like he was "all alone." The Pattersons were "grateful for somebody offering to help," so they accepted Principal Rozeveld's offer and kept DP in school. DP's mother testified that the first time DP met Principal Rozeveld it was "very nice." However, the next two or three times that DP went to his office, Mr. Rozeveld was in a meeting or otherwise unavailable. DP's mother explained to DP that "sometimes that is going to happen, emergencies come up." It appears that because Principal Rozeveld (as head of the middle school) could not always be guaranteed to be in his office at the time DP's teachers sent him down during class, it was decided that DP would be sent down at the end of the day along with the students who were having their planners signed. DP did this and met with Principal Rozeveld for a number of weeks, but DP then decided he did not want to continue going because he was concerned the other students might start to think he was a "problem student." *See* J.A. at 844-850. That was his choice. It is undisputed that Principal Rozeveld offered to, and did, regularly meet with and counsel DP until DP stopped the sessions. It is also undisputed that Principal Rozeveld did this to keep DP in school, to improve his grades, to build his trust, and to prevent him from feeling alienated. That DP might have preferred to meet with Mr. Rozeveld at a different time and under different circumstances does not take away from the fact that --- rather than being deliberately indifferent --- Mr. Rozeveld was unquestionably trying to help DP through this difficult time.

Second, the school district placed DP in a "resource room" for part of each day while he was in the eighth

grade which, everyone agrees, worked very well for him. The majority states that the resource room reduced the actual amount of harassment directed at DP, *see* Maj. Op. at 15-17, n.7, and it faults the school district for discontinuing that room once DP entered high school. *See id.* at 5-6, 15-17. The undisputed facts do not support such an inference. It is true that the resource room was available to DP for one hour each day while he was in the eighth grade. He went there to meet his science teacher, Mr. Adams, and "just kind of wind my day down with him, do my homework." *See* J.A. 621-22. It was the equivalent of study hall. Because DP claims that the harassment occurred in his classes, in between his classes, in the hallways, at lunch, and in the locker areas, it simply does not follow that a study hall for an hour each day could have reduced the harassment to an appreciable degree. In fact, not even DP claims that it did. Rather, he testified that eighth grade was "going good" on its own, and he had "no clue" what caused this positive turnaround. *See id.*[6] What is established by the undisputed facts is that the time spent with Mr. Adams helped DP cope with his peers which, in turn, helped him better deal with the harassment and learn

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[6] I emphasize that it was DP himself who testified that the resource room was the equivalent of a study hall ("I would just kind of wind my day down with [Mr. Adams], do my homework"), and, furthermore, not even he claims that it reduced the actual harassment ("Q: What happened to cause that turnaround? A: I have no clue."). J.A. at 621-22. DP explained that other students in the resource room needed help with their homework, but he "just needed Mr. Adams in there in case I needed him." DP thus benefitted from time in the resource room because Mr. Adams was his "go-to person" and "one of the only staff members at the school that I felt like I could trust." *See* DP's Depo. at 67-69.

more effectively. Indeed, DP testified that even though he was sometimes picked on and called names in the eighth grade, the harassment did not "bother" him during the time that he was meeting regularly with Mr. Adams. *See* J.A. at 622. This distinction between meeting with Mr. Adams and being in the resource room is important, for there is nothing in the record to indicate that the resource room itself reduced the actual amount of harassment, as the majority suggests. Rather, it appears that the resource room was effective because of Mr. Adams. DP could not continue getting daily assistance from Mr. Adams once he entered high school, however, because Mr. Adams worked exclusively for the middle school. Nevertheless, even though he did not work for the high school, the defendant granted Mr. Adams special authorization to meet with DP for 20-30 minutes each week (which he did), even after DP entered the ninth grade. *See* J.A. 854-57. If the defendant was deliberately indifferent to DP and his situation, surely it would not have authorized the middle school science teacher to meet and counsel him every week after he started high school. No reasonable finder of fact could find that there was deliberate indifference with respect to Mr. Adams and the resource room.

And lastly, the school district had various policies and programs dealing with harassment and bullying. All students were well aware that such conduct would not be tolerated. The student athletic code, for example, provided that students were expected to "behave appropriately in the locker room. Horseplay and vandalism will not be tolerated by the coaches or the athletic department." *See* J.A. 54. Violations of this policy were punishable as provided for under the code. The student handbook (which applied to all students,

not just athletes) prohibited vandalism, physical confrontation, and inappropriate language, and it also provided for punishment to violators. *See id.* at 82-88. There were two school-wide programs implemented which dealt specifically with peer harassment and bullying, "Bang, Bang, You're Dead" and "Flirting and Hurting." The majority refuses to consider the policies and programs because it finds evidence that they were "not explained to every student and teacher." *See* Maj. Op. at 18 n.10. For this, the majority cites an affidavit from a former student and classmate of DP's who, although she recalls the teachers reviewing the student code of conduct with students, does not "recall ever receiving any *serious instruction* about bullying, teasing or harassment of other students." *See* J.A. at 145 (emphasis added). The majority next relies on an affidavit by a temporary substitute teacher (DP's brother) who taught at DP's middle school for less than four months and who affirms that he did not receive instruction on the policy for bullying and harassment. *See* J.A. at 228. The majority also cites to an affidavit signed by the plaintiffs' expert witness who has opined that, in any event, "no matter how powerfully presented, [one-time programs such as "Bang, Bang, You're Dead"] have not been demonstrated to have a significant lasting impact on a school's climate or culture or reducing or eliminating bullying or harassment." *See* Maj. Op. at 18 n.10. Although this evidence (accepted as true for purposes of the summary judgment motion) may speak to the overall effectiveness of the policies and programs, and may be relevant if negligence were the standard, its relevance to the issue of deliberate indifference is questionable. *Cf. Sanchez v. Alvarado,* 101 F.3d 223, 229 (1st Cir. 1996) (defendant had an inefficient and ineffective anti-harassment policy and "leisurely" responded to

harassment complaints; whether the policy could have been more effective and better-implemented may have some bearing on whether defendant was negligent, but noting *that is not the standard for deliberate indifference*). The affidavits relied on by the majority do not create a genuine issue of material fact on the issue of deliberate indifference. The majority has not cited any case law, and my own research has uncovered none, holding that good faith (although inefficient) policies and programs addressing peer harassment and bullying may be considered in the deliberate indifference context only if the students subjectively perceive them to be "serious instruction;" only if temporary substitute teachers are aware of them; and only if they have been first shown to have "significant lasting impact."

In light of the above, it seems to me that the district judge properly found that there were no genuine disputed issues of material fact and that, as a matter of law, the school was not deliberately indifferent. As already noted, deliberate indifference is a high standard to meet, and the analysis is very deferential to schools. Relying on *Davis*, *supra*, the Sixth Circuit has described the appropriate legal standard as follows:

> The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. *See Davis*, 526 U.S. at 642, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (discussing *Gebser v. Lago Vista School Dist.*, stating liability arose from recipient's official decision not to remedy the violation). "[T]he deliberate indifference must,

> at a minimum, 'cause [students] to undergo harassment or make them liable or vulnerable' to it." *Davis*, 526 U.S. at 645, 119 S. Ct. 1661, 143 L. Ed. 2d 839.

Vance v. Spencer County Pub. School Dist., 231 F.3d 253, 260 (6th Cir. 2000). The Sixth Circuit's language is particularly on point in this case:

> The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, "the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-649. The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id.* at 648. The standard does not mean that recipients must expel every student accused of misconduct. *See id.* Victims do not have a right to particular remedial demands. *See id.* Furthermore, courts should not second guess the disciplinary decisions that school administrators make. *See id.*
>
> "The Supreme Court has pointedly reminded us, however, that this is 'not a mere "reasonableness" standard' that transforms every school disciplinary decision into a jury question." *Gant*, 195 F.3d at 141 (quoting *Davis*, 526 U.S. at 649). In an appropriate case, there is no reason why courts on motion for a directed verdict could not identify a response as not

> "clearly unreasonable" as a matter of law. *See Gant*, 195 F.3d at 141.

Id. The majority glosses over this high legal standard rather quickly, *see* Maj. Op. at 12-13, and it seizes upon the following additional language in *Vance*:

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

231 F.3d at 261. The majority seems to interpret these two sentences to mean that even if the school district takes disciplinary action in response to all known harassment, and even if that action is 100% effective against the individual harassers, it may be liable if there is subsequent harassment by new offenders. There is no authoritative case law to support such an interpretation. For this sweeping expansion of *Vance*, the majority relies heavily on a single out-of-circuit *district* court case, *Theno v. Tonganoxie Unified School Dist. No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005). The district judge in that case did, indeed, reach the same conclusion as the majority. However, there are two reasons why it cannot be relied upon.

First, it is merely one district judge's opinion and has no authoritative value. Indeed, this very same panel recently noted that *intra*-circuit district court cases are of limited value. *See United States Student*

Ass'n Foundation v. Land, 546 F.3d 373, 383 n.8, 385 n.10 (6th Cir. 2008). It seems to me, then, that the opinion of a single district court judge from *outside* this circuit is an even thinner reed upon which to base an expansion of this court's jurisprudence.

Second, and more significantly, it is not persuasive regarding the applicable legal standard. I do not believe the district judge's opinion in *Theno* and the majority's opinion today are justified by the Sixth Circuit's analysis in *Vance*, nor are they otherwise consistent with any circuit's case law. The harassment in *Vance* was far more egregious, and the response thereto was far less appropriate, than in this case. The student in *Vance* was subjected to widespread harassment and physical abuse. She was the victim of frequent and vulgar name-calling ("whore" and "gay girl," etc.), and she was touched inappropriately in almost every class. She was stabbed in the hand with a pen during one assault, and, on another occasion, two students held her down and tried to rip off her clothes while another student took off his pants and said that he was going to rape her. School officials "talked to" the offenders, but, incredibly, did not take any further disciplinary action against them. The harassing conduct not only continued, but it increased. In fact, the offenders confronted her *after* they had been "talked to" specifically in order to harass her again. Even though "'talking to the offenders' produced no results, [the school] continued to employ this ineffective method." *See* 231 F.3d at 262. It was this factual background which led this court to conclude that if a school district "has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known

circumstances." *Id.* at 261. *Vance* thus confronted the situation where the harassing students *re-offended after they were disciplined* (*i.e.*, the discipline "produced no results"), yet the school knowingly continued to use the same ineffective method. This conclusion has no application whatsoever to the present case where the reprimands and other forms of discipline were extraordinarily effective as to the known offenders. The facts of this case are plainly distinguishable from *Vance*. Again, the defendant here investigated DP's complaints, and the offending students were counseled, reprimanded, suspended, and/or expelled, depending on the nature of their specific misconduct. No student who received discipline ever bothered DP again. The undisputed facts thus establish that the school district's actions were 100% effective with respect to those students.

On this point, a decision out of the Third Circuit is very similar and persuasive. *See Doe v. Bellefonte Area School Dist.*, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), *aff'd* 106 Fed. Appx. 798 (3d Cir. Aug. 4, 2004).[7] The student there was ridiculed and harassed by his fellow students for years. He was called "queer," "gay boy," "pixie," "faggot," and "peter-eater," among other things. He was pushed at school and physically assaulted at the bus stop. He reported some (but not all) of the bullying and harassment, and the school took varying degrees of disciplinary action when the harassment was reported. Some of the offenders were

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[7] Although this is an unpublished case and has no precedential value in this circuit, a decision of a three-judge panel from a sister court of appeals has to be more persuasive than a single district judge's opinion from outside this circuit.

given verbal warnings and reprimands, some were counseled about the seriousness of the harassment, some were given detention, and others were suspended. Notably, every time the school warned or disciplined an offender, "that perpetrator never bothered Doe again. The School District's method of dealing with specific, identified perpetrators involving Doe was one hundred percent effective." 2003 WL 23718302, at *9. Based on the 100% success rate with the individual offenders, coupled with the school agreeing to be extra "vigilant" of the problems and having an anti-harassment policy, the district court granted summary judgment in favor of the school district because "no reasonable finder of fact could conclude that the School District was deliberately indifferent to the harassment of Doe, or that its responses to the harassment of which it was aware were clearly unreasonable." *Id.* at *9-10

The plaintiff appealed, arguing, as the plaintiffs do here, that the school "should have treated the pattern of harassment as a systemic problem," and its failure to do so was deliberate indifference. 106 Fed. Appx. at 799. He argued that the school's response was clearly unreasonable in light of the known circumstance that the harassment continued, even though "each subsequent incident involved a student other than the student that had been disciplined in any of the prior incidents of harassment directed at Doe." *Id.* In affirming, the Third Circuit relied upon the Supreme Court's guidance to lower courts in *Davis,* and held:

> The relevant inquiry for purposes of evaluating whether the School District here was deliberately indifferent to known circumstances of harassment is to review its response to

reported incidents of harassment. *Each and every time Doe complained, the School District responded with reasonable actions which eliminated further harassment between Doe and the student(s) involved in each incident.* Students were suspended and others were given warnings and counseled regarding the seriousness of harassment. In addition, the School District circulated memoranda to faculty and staff putting them on notice of the reported harassment of Doe and requesting assistance to prevent further incidents. Doe was provided with a special means of reporting any additional harassment through the school psychologist, whom he knew personally. The School District also held assemblies and enacted policies addressing peer-to-peer harassment. Such actions are not clearly unreasonable.

Nor was the School District deliberately indifferent because it did not undertake the specific remedial action that Doe desired given what he perceived to be the "systemic nature of the harassment." *Davis* does not require school districts to purge their schools of actionable peer harassment or to engage in particular disciplinary action. *Id.* at 648. *We will refrain from second-guessing the disciplinary decisions made by the School District which effectively eliminated each reported source of harassment.* We do not minimize the unfortunate verbal abuse that Doe was subjected to during his high school years, but *the School District was not deliberately indifferent because additional harassment occurred under new and different*

> *circumstances*. We will affirm the judgment of the district court.

Id. at 800 (emphasis added).[8]

More importantly, it seems to me that the majority's decision today is inconsistent with a recent decision from this court. The plaintiff in *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445 (6th Cir. 2008), who had physical and mental disabilities, was harassed by fellow students. The harassment was systemic and it lasted for three years. Among many other things, the students called him "gay," "queer," "bastard," and "retard;" they pushed and tackled him in the hallway and lunchroom; they threw paper towels at him that had been soaked with water or urine; they threw bleach on him in science class; and they slammed his head into a glass sneeze-guard, the

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[8] *Bellefonte*, as noted, is quite similar to this case. The Third Circuit found it significant that the offending students were given warnings and counseled about the seriousness of their actions; each time the school took action the harassment by that particular student stopped; the teachers were advised and agreed to be vigilant about future harassment; the plaintiff was given the means to report harassment through a faculty member whom he knew and trusted; and the school district had an anti-harassment policy. Each of these factors is present here. I also note that in deciding *Bellefonte*, the Third Circuit impliedly rejected the interpretation of *Vance* suggested by the majority today, even though it was urged by the appellant on appeal. *See generally* 2004 WL 3759879, at *20-21, *25-28 (appellant's brief) (interpreting and citing *Vance* for the view that if a school district discovers that its response to known harassment is inadequate against "systemic harassment" (even though it may be effective against the individual harassers), then the school must take "additional actions" to avoid "new liability").

latter incident necessitating a trip to the hospital and treatment for a sprained neck. On one occasion, a student sexually assaulted the plaintiff by grabbing plaintiff's genitals and saying "Now I'll see if you are a woman." After a fight between the plaintiff and "one of his frequent attackers," the police were called to the school.[9] When these incidents were reported, "they were investigated, and responsive action was taken." *See S.S. v. Eastern Kentucky Univ.*, 431 F. Supp. 2d 718, 728 (E.D. Ky. 2006). The school responded to the incidents of which it was made aware by conducting interviews to decide who was at fault and disciplining those who were; instructing S.S.'s classmates not to taunt him; speaking to the students about the name-calling; adding extra monitoring; at times separating S.S. from students with whom he had problems; assisting the police in regards to the fight noted above; and contacting the parents of students involved.

Despite these efforts, the harassment continued, and S.S. filed suit against the school under the Americans with Disabilities Act.[10] He argued, in

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[9] These facts are set forth in the district court opinion granting summary judgment for the defendant, 431 F. Supp. 2d 718 (E.D. Ky. 2006), which the Sixth Circuit stated was "an accurate description of the numerous incidents that underlie S.S.'s claims." *See S.S., supra,* 532 F.3d at 449. Although there was a dispute as to whether all of the events happened as the plaintiff described, or whether he was himself responsible for initiating many of the confrontations, the court assumed, as it was required to do on summary judgment, that the plaintiff's evidentiary assertions were true. *See, supra,* 431 F. Supp. 2d at 727-28.

[10] Although the action was not filed under Title IX, the Sixth Circuit evaluated the ADA claim pursuant to, and applied the

relevant part, that the school did not adequately respond to, and end, the harassment. The district court granted summary judgment in favor of the school, and, on appeal, the Sixth Circuit confined its analysis to the deliberate indifference issue. To illustrate the distinction between when the issue should be left for the jury to decide, and when it can be decided on summary judgment, this court discussed two district court cases that it believed were "instructive," *K.M. v. Hyde Park Cent. School Dist.*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005); *Biggs v. Board of Educ. of Cecil County, Maryland,* 229 F. Supp. 2d 437 (D. Md. 2002).[11] In *K.M.*, the student endured peer harassment for years. The school had notice of the harassment, but it took no steps to help or protect him and no one was disciplined. On those particular facts, the district court properly denied summary judgment for the school. *Biggs*, by contrast, involved similar peer-on-peer harassment, but in that case the school took action whenever there was a reported incident, including counseling the victim, meeting with the offenders and threatening them with suspension, notifying the parents, and alerting teachers to the problem. Because such responses established that the school district was not deliberately indifferent, the district court properly granted summary judgment for the school. The Sixth Circuit observed that the facts of *S.S.* "closely mirrored" *Biggs* and it went on to conclude that the

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deliberate indifference standard under, the framework set forth in *Davis*. *See* 532 F.3d at 453-54.

[11] I note that the Sixth Circuit looked to these out-of-circuit district court cases merely for illustrative purposes and not, as the majority apparently does with *Theno*, as a significant basis for its holding.

school was not deliberately indifferent as a matter of law, even though its efforts were unsuccessful and even though the widespread harassment continued. This court explained that "meeting with the students, communicating with parents, and disciplining the offending students" simply did not "give rise to an inference that [the school] was deliberately indifferent to S.S.'s situation or that it had an attitude of permissiveness that amounted to discrimination." *See* 532 F.3d at 455-56. Insofar as the defendant here took essentially the same action (investigating, counseling, extra monitoring by staff, seating preferences to separate DP from problem students, meeting with and disciplining the students found at fault, contacting parents, and assisting the police --- the sum of which was 100% effective against the individual harassers), this case is a close fit to the scenario in *S.S.*

That is not to say, of course, that a school may avoid liability merely by taking some action, however minor, in response to known harassment. *See Vance, supra,* 231 F.3d at 260 (rejecting the argument that as long as a school district "does *something* in response to harassment," then it has not acted with deliberate indifference) (emphasis added). The pertinent inquiry is whether the response was appropriate under the particular circumstances. Quoting the Title IX guidelines, *Vance* described an "appropriate response" to known harassment as follows:

> [Schools] should take immediate and appropriate steps *to investigate or otherwise determine what occurred* and take steps reasonably calculated to *end* any harassment, *eliminate* a hostile environment if one has been

> created, and *prevent* harassment from occurring *again*.

Id. at 261 n.5 (emphasis added). Thus, a school acts appropriately if it investigates what has already occurred, reasonably tries to end any harassment still ongoing by the offenders, and seeks to prevent the offenders from engaging in such conduct again. That is exactly what happened in this case. It is manifestly unreasonable to read the guidelines and *Vance* as holding that a school district may be responsible for not preventing *future* harassment by *entirely separate and new* harassers. To suggest otherwise, as the majority does, comes extremely close to requiring that schools be "purged" of all offensive behavior and be completely harassment-free, which the Supreme Court and Sixth Circuit have unequivocally held is not required --- or possible. *See Vance, supra,* 231 F.3d at 260-61 (citing and quoting *Davis*).

Whether the defendant, from an objective viewpoint, could have (or should have) done more to stop the harassment is not the appropriate inquiry. "Lack of objective reasonableness, *i.e.*, a failure to act as a reasonable person would have acted, does not by itself equal deliberate indifference." *See Brooks v. Celeste,* 39 F.3d 125, 129 (6th Cir. 1994). Nor does liability turn upon whether the school successfully remedied the harassment. The only question is whether the school "*intentionally acted in clear violation of Title IX* by remaining deliberately indifferent *to known acts of harassment*," and whether its response was so "clearly unreasonable" and inadequate that it facilitated and subjected DP to harassment. *Vance, supra,* 231 F.3d at 260; *see also Davis, supra,* 526 U.S. at 642-47. Based on the

undisputed facts in the record, any reasonable juror would have to answer that question "No." Therefore, as a matter of law, the district court properly held that the defendant was not deliberately indifferent.

For these reasons, I believe the district court's decision should be affirmed and I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NO. 05-74439

[Filed November 28, 2007]

DAVID PATTERSON and DENA PATTERSON,	)
Plaintiffs,	)
v.	)
HUDSON AREA SCHOOLS and KATHY MALNAR,	)
Defendants.	)

HON. LAWRENCE P. ZATKOFF

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 28th day of November, 2007.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendants' Motion for Summary Judgment. Plaintiffs have filed a response. Defendants have since replied. The Court finds that the facts and legal arguments pertinent to Defendants' Motion are adequately presented in the parties' papers, and the decision process will not be aided by oral arguments. Therefore, pursuant to E.D. Mich. Local R.7.1(e)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted, without this Court entertaining oral arguments. For the reasons that follow, Defendants' Motion for Summary Judgment is GRANTED.

II. BACKGROUND

When Dane Patterson ("Dane") was 10 years old, he received psychological treatment from Dr. Gretchen Warwick, PhD ("Dr. Warwick"). At that time, Dr. Warwick treated Dane for anger issues related to family dynamics. According to Dr. Warwick, those issues were resolved prior to 2002. On May 2, 2002, Dane began seeing Dr. Warwick again, allegedly due to issues that arose as a result of his attendance at Hudson Middle School while he was in sixth grade. Specifically, Dane claimed he was subject to teasing, name calling and pushing and shoving by other students. Dr. Warwick concluded Dane was distraught, anxious and angry due to school related issues.

In seventh grade at Hudson Middle School, Dane experienced (1) daily name calling, including such things as "fag," "faggot," "gay," "fat pig," "man boobs," and "big boobs" (allegedly more than 200 times that

year); (2) being called "Mr. Clean" (allegedly a derogatory term that referred to a lack of pubic hair) on a regular basis; (3) being jostled and pushed in the hallways on a frequent basis (allegedly more than 200 times that year); (4) being slapped by a seventh grade girl named Brittany when Dane attempted to intervene on behalf of a girl being teased and taunted by Brittany; (5) being teased by a teacher, John Redding ("Mr. Redding"), later that same day when Mr. Redding asked Dane in front of the class "How does it feel to be slapped by a girl?"; and (6) after withdrawing from playing on the seventh grade basketball team to focus on his fluctuating grades, at least twice being accused of being a "quitter" by Mr. Redding. By the end of the first semester of seventh grade, Dane wanted to quit school. At that time, Principal Greg Rozeveld ("Principal Rozeveld") offered to mentor Dane through the struggles Dane was experiencing. The parties disagree as to the reasons why, but Mr. Rozeveld did not perform that task for very long.

During sixth and seventh grade at Hudson Middle School, Plaintiffs state that they discussed with Hudson Middle School personnel issues Dane was experiencing, as follows:

1. Sixth Grade:

    a. Dave Patterson spoke to a teacher about teasing directed at Dane and how Dane felt upset and humiliated.

    b. Plaintiffs attended parent teacher conferences to talk about the name calling, etc.

c. Plaintiffs met with Principal Rozeveld to discuss the pushing, shoving and name calling of Dane.

2. Seventh Grade:

a. Plaintiffs and school counselor Susan Mansfield ("Ms. Mansfield") discussed the fact that Dane was having a hard time at school in November and/or December, 2002.

b. Plaintiffs and several teachers met to discuss Dane's anxiety about being (i) bullied and teased, (ii) the victim of sexually offensive name calling, and (iii) pushed into lockers.

c. Plaintiffs met with Principal Rozeveld just before Christmas 2002 about Dane not wanting to come back to school because of teasing, bullying, and being called "gay", "fag", "queer." Plaintiffs also discussed the impact of those things on Dane's schooling, his feelings of being ostracized and his suffering grades. Names of perpetrators allegedly were provided. They also discussed the incident of Dane being slapped by Brittany and Mr. Redding teasing Dane about it.

d. During the second semester of seventh grade, Plaintiffs discussed problems Dane endured with Ms. Mansfield and other staff.

e. Plaintiffs communicated with school staff throughout Dane's seventh grade year over

> academic and social issues. The parents asked staff what, if anything, Dane was doing to cause his peers to tease and taunt him. Plaintiffs claim that they were told consistently that Dane was doing nothing wrong.

School records reflect that Dane's grades fluctuated while he was in seventh grade. His progress reports often reflected failing grades, but his final grades were much higher (usually As and Bs). Plaintiffs claim that during seventh grade, Dane was withdrawn and even resorted to eating lunch in the band room by himself.

Near the end of the 2002-2003 school year (seventh grade), Ms. Mansfield spoke with Lenawee Intermediate School District Social Worker Tammy Cates ("Ms. Cates") about a special education review. Ms. Mansfield and Ms. Cates filled out a referral form and had Mrs. Patterson sign it. Ms. Cates and Brian Moeckel (the School Psychologist) conducted an evaluation of Dane in early summer. At the beginning of Dane's eighth grade year, a Multi-Disciplinary Evaluation Team evaluated Dane for special education services. That team found Dane to be emotionally impaired under the Individuals with Disabilities Educational Act. An Individual Educational Placement Team ("IEPT") was then convened and a special education program was developed for Dane. As part of the program, Dane was assigned to teacher Ted Adams' ("Mr. Adams") resource room during sixth hour. With the aide of Mr. Adams, Dane was able to cope with eighth grade and had a good year.

Upon entering ninth grade at Hudson High School in the fall of 2004, Dane's IEPT program was altered.

Mr. Adams was no longer available for resource room services because he was a middle school teacher.[1] Hudson High School Principal Michael Osborne ("Principal Osborne") felt resource room services were not appropriate for Dane. Dane, per the IEPT's decision, remained in general education. Plaintiffs claim that the teasing and bullying Dane experienced in seventh grade began anew, at the same level as in seventh grade. Shortly after classes resumed, Dane allegedly began to be called names such as "gay," "fag," "faggot" and "queer" multiple times daily. The jostling, bumping, pushing and shoving in the hallways also resumed between classes. That fall, three students began to tease Dane about "Mr. Clean." The three students involved were called into a meeting with Dane and Ms. Mansfield. At that meeting, the three students apologized. Dane admits that none of the three ever bothered him again. That same fall, another student, Joe, took Dane's planner in a classroom and inscribed it with (a) sexually derogatory slurs such as "I love penis" and "I lick it in the ass," and (b) sexually explicit pictures of buttocks and penises. Joe was verbally reprimanded by Ms. Mansfield, and Dane never had a problem with Joe again.

In Dane's history class, students were allowed to use note cards during presentations. One student wrote a series of words on the back of some of his notes cards (the side visible to his classmates, including Dane). The first card said "Dane," the second "is," the third "a," and the fourth "fag." This apparently caused intense laughter in the class, although the teacher in

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[1] Ultimately, Mr. Adams voluntarily served as a contact person for Dane for 25 to 30 minutes a week while Dane was in ninth grade.

the room never saw the incident. After the incident was reported by Dane, Ms. Mansfield called the student into her office, told the student that such action might be sexual harassment and verbally reprimanded the student. The history teacher also reprimanded the offending student. In addition, that student was reported to the administration by Plaintiffs and Ms. Mansfield. Dane did not have any subsequent problems with that student.

In March 2005, Dane's gym locker was broken into, his clothes were removed from the locker and urinated on, and his tennis shoes were thrown into the toilet. School officials were unable to ascertain the perpetrators and no punishment was imposed. Later that spring, Dane arrived at his locker in the hallway to find a poster of "Mr. Clean" taped to it. After the incident was reported, school officials determined that two students were involved. Principal Osborne verbally reprimanded one student, Kyle, because it was his first offense. The second student, Jeff, was suspended for a day because he had committed a prior (unrelated) offense. Dane did not experience any problems with Kyle or Jeff thereafter.

At about the same time, Dane's locker was vandalized by students who used permanent markers to write such things as "gay," "fag," "queer" and other similar words up and down the locker. In addition, a graphic picture was drawn of a penis being inserted into what appeared to be a rectum. The inside of Dane's locker also had writing on it that stated "suck your mother's tits," "you suck penis" and other similar kinds of things. School administrators immediately had Dane's locker cleaned and investigated this incident. Potential witnesses and students with lockers

in the vicinity of Dane's locker were interviewed, but the administrators could not ascertain who committed the acts. That same spring, Dane's gym locker was covered with shaving cream spelling out sexually oriented words on at least one occasion. Again, school administrators were unable to determine the vandals.

In late May 2005, Dane was assaulted in the locker room after one of his junior varsity baseball team's practices. The perpetrator was a student named Lance. Dane had never had any problems with Lance prior to incident, nor had there ever been any allegations that Lance had engaged in any misconduct of a sexual nature. Nonetheless, after baseball practice one Friday, Lance was naked and rubbed his penis and scrotum against the back of Dane's neck and side of his face (an act called "teabagging"). Another student, Nick, blocked Dane's exit from the locker room. Dane informed Plaintiffs of the incident later that day. Dane's brother, the junior varsity baseball team's coach, was informed of the incident later that night (he was not present in the locker room when the incident occurred). Plaintiffs did not contact school administrators that day, nor did they contact the police at that time. The next day, a Saturday, Dane played in the doubleheader with Lance, and the coach of the team (Dane's brother) put Lance in the starting lineup. Plaintiffs did not inform Hudson Area Schools administrators of the incident until some time during that doubleheader.

On Monday (two days later and the first day of school after the locker room incident), Principal Osborne and Assistant Principal Tom Durbin ("AP Durbin") began conducting a formal investigation into the allegations. Lance immediately was suspended for

the remainder of the school year, and he was expelled soon thereafter. Lance's subsequent application for re-entry into the Hudson Area Schools was denied. Although Dane informed the school that Nick was only "joking around," Nick was punished by the Hudson Area Schools. After the Hudson Police Department opened an investigation into the matter several days later (when Plaintiffs filed a complaint), administrators at the Hudson Area Schools cooperated with the Hudson Police Department, including sharing the results of Hudson Area Schools' internal investigation. Lance eventually was criminally prosecuted. No criminal charges were brought against Nick.

At some point following the incident, the varsity baseball coach convened a team meeting of junior varsity and varsity players and commented (with Dane present) that players should only joke with men who can take it. After the locker room incident, Dane's IEPT program was modified to provide for off-site services at Sacred Heart School. After what Plaintiffs describe as a poor tenth grade year for Dane, the IEPT reconvened in 2006 and Dane was allowed to take classes for eleventh grade and twelfth grade through college placement courses.

As a result of the alleged student-on-student harassment directed at him while attending Hudson Area Schools, Dane claims that he has been psychologically unable to step foot inside a Hudson Area School building since the spring of 2005. Dane apparently graduated from Hudson Area Schools a year early and currently is attending college.

III. LEGAL STANDARD

Summary judgment is appropriate only if the answers to the interrogatories, depositions, admissions, and pleadings, combined with any affidavits in support show that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law. *See* FED. R. CIV. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)(citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable to the non-moving party. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for

summary judgment. *See Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993).

IV. ANALYSIS

A. Title IX Claims

Plaintiffs first allege that Defendants violated Title IX of the Education Amendments of 1972 (hereafter "Title IX"),[2] which provides, in relevant part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . .

20 U.S.C.A. §1571(a).

In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 653 (1999), the Supreme Court held that recipients of Federal funds (such as Hudson Area Schools) may be liable for damages under Title IX for student-on-student sexual harassment. In *Davis*, the Supreme Court established that Title IX may support a claim for student-on-student sexual harassment when the plaintiff can demonstrate the following elements:

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[2] As there is no individual liability for a Title IX claim, the Court hereby DISMISSES Plaintiffs' Title IX claim as to Superintendent Malnar, to the extent such a claim has been made. *See Soper v. Haben*, 195 F.3d 845 (6th Cir. 1999).

(1) The sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;

(2) The funding recipient had actual knowledge of the sexual harassment; and

(3) The funding recipient was deliberately indifferent to the harassment.

Vance v. Spencer Cty. Pub. Sch., 231 F.3d 253, 258 (6th Cir. 2000). A single occurrence may give rise to a finding of a hostile environment within the context of Title IX. *Id.* at 259; *Doe v. School Admin. Dist. No. 19*, 66 F.Supp.2d 57, 62 (D.Me. 1999).

1. Severe, Pervasive and Objectively Offensive Conduct

This prong requires the Court to examine (a) the nature of the conduct *(i.e.*, sexual harassment), (b) whether the conduct was severe, pervasive and objectionably offensive, and (c) whether Dane's access to educational opportunities or benefits provided by the school was adversely impacted and/or denied. In light of *Davis* (the seminal Supreme Court case on student-on-student sexual harassment), *Vance* (the key Sixth Circuit case involving this same issue), and the fact that the Court must view all of the evidence in a light most favorable to the Plaintiffs in deciding this motion (*see Matsushita, supra*), the Court finds that there is sufficient evidence on the record to satisfy all three elements of the first *Davis* prong.

The facts of *Davis* and *Vance* are instructive when evaluating whether the evidence of student-on-student harassment in this case (1) was of a sexual nature, (2) was severe, pervasive and objectively offensive, and (3) adversely impacted or denied Dane's access to educational opportunities or benefits provided by Hudson Area Schools:

> In *Davis*, a male student fondled a female student's breasts; spoke in vulgar language to her; engaged in sexually suggestive behavior toward her; told her "I want to get into bed with you" and "I want to feel your boobs"; and placed a door stop in his pants and acted in a suggestive manner toward her. 526 U.S. at 633-636, 119 S.Ct. 1661. At the end of the string of incidents, the male student pled guilty to sexual battery. *See id.* at 634, 119 S.Ct. 1661. As a result of the harassment, plaintiff alleged that her grades had dropped and she had written a suicide note. *See id.* The Supreme Court found that these actions amounted to severe, pervasive, and objectively offensive conduct, particularly given the offensive touching. *See id.* at 653, 119 S.Ct. 1661.
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> In [*Vance*], as in *Davis*, Alma [the plaintiff] has submitted abundant evidence of both verbal and physical sexual harassment. Although one incident can satisfy a claim, Alma has presented several instances that reflect not only severity and pervasiveness, but also circumstances that effectively denied her education. On one occasion, Alma was stabbed in the hand. On another, two male students held Alma while others yanked off her shirt, pulled her hair, and

> attempted to disrobe. These physical attacks merely layer the testimony regarding verbal propositioning and name calling. In addition, Alma's Title IX complaint, filed with [defendant school] in May 1995, curiously warranted her completing her studies at home, but not an investigation. Given the frequency and severity of both the verbal and physical attacks, it is no wonder that Alma was diagnosed with depression. Given this evidence, Alma has satisfied the severity and pervasiveness requirement.

Vance, 231 F.3d at 259 (footnote omitted).

In this case, Dane Patterson was being called "gay," "queer" and "fag" in seventh grade (and perhaps as early as in sixth grade) on a repetitive basis (at least 200 times during his seventh grade school year, according to Dane). During Dane's seventh grade school year, students also began calling him "Mr. Clean." Students taunted Dane with comments such as "man boobs," "big boobs" and other similar terms. In addition, Mr. Redding made fun of Dane in class in front of his peers by stating something to the effect of "How does it feel to be hit by a girl?"

While Plaintiffs say little about in the eighth grade school year, Plaintiffs allege that the harassing conduct resumed with intensity similar to that in the ninth grade. Students again called Dane "gay," "fag," "faggot" and "queer" (allegedly, over 200 times again during ninth grade). As noted above, the references to "Mr. Clean" resurfaced, Dane's planner was defaced by sexually explicit terms and drawings, and the note card incident in history class occurred. In addition, his

clothes were urinated on and his shoes thrown into the toilet, his gym locker had sexual epithets written in shaving cream, the exterior of his hallway locker was adorned with words such as "gay," "fag" and "queer," as well as the pictorial display of a penis being inserted into a rectum, and the inside of his locker was vandalized with sexual comments. Finally, at the end of the year, Dane was assaulted by Lance in a manner that clearly was an offensive, sexual touching.

The above acts establish a lengthy and prolonged history of harassment, at least some of which was sexual in nature. Based on the alleged frequency and duration of the harassment (two full school years in a three-year period), it also could be considered severe, pervasive and objectionably offensive.[3] Moreover, the fact that Dane physically stopped attending Hudson Area Schools before his sophomore year constitutes sufficient evidence to create, at a minimum, a genuine issue of material fact as to whether his access to educational opportunities and benefits provided by the school was adversely impaired and/or denied.

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[3] In *Davis*, the victim endured five months of harassment, including physical touching and verbal statements that were sexual in nature. In *Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Mn. 2000), the court recognized as potentially discriminatory conduct things such as taunts against a male based upon perceived sexual orientation, including "faggot", "fag", "gay", "Jessica", "girl", "gay boy", "bitch", "queer", "pansy", and "queen." In that case, the teasing was frequent and continued for a number of years, with an increasing escalation to the point of physical violence manifesting in pushing, kicking, being knocked down, throwing of books around, and smashing a calculator. Those facts can be viewed as similar to the alleged actions toward Dane in the case now before this Court.

Accordingly, the Court finds that Plaintiffs have met their burden as to the first prong of the *Davis* test.

2. Notice Requirement

In *Davis*, the Supreme Court found that actual notice had been provided to the defendant school where the student and parent repeatedly complained of harassment to the teachers and principal. *Davis*, 526 U.S. at 654. In *Vance*, the student and her mother made repeated verbal and written reports to the school, including teachers and principals, and then filed a Title IX complaint with the school. On that basis, the Sixth Circuit concluded that plaintiff had satisfied her burden of demonstrating defendant had actual knowledge. *Vance*, 231 F.3d at 259.

Plaintiffs testified at their depositions that they repeatedly informed teachers and administrators at Hudson Area Schools that Dane was subject to comments and actions of a sexual nature. Plaintiffs' and Dane's relevant complaints may have been voiced as early as when Dane was in sixth grade (but indisputably commenced no later than when he was in seventh grade in the fall of 2002) and continued off and on until he stopped attending Hudson Area Schools in the spring of 2005. Plaintiffs' and Dane's complaints were lodged with teachers and administrators, including Principal Rozeveld, Ms. Mansfield, Mr. Adams, Principal Osborne and AP Durbin. Dane and/or the Plaintiffs testified that they notified such persons of all of the incidents described above. For purposes of this motion for summary judgment, the Court must accept as true Plaintiffs' claims that Plaintiffs and Dane repeatedly notified and communicated to the teachers and administrators at

Hudson Area Schools that Dane was being harassed. Significantly, Defendants do not deny that they had knowledge of the incidents described above.

As a result of the notices from Plaintiffs and Dane, the Court finds that Defendants had knowledge of multiple instances of alleged student-on-student sexual harassment involving Dane as the victim. Accordingly, the Court concludes that Plaintiffs have satisfied the second prong of the *Davis* test, as they have demonstrated Defendants had actual knowledge of the alleged sexual harassment.

3. Deliberate Indifference

A federal assistance "recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment." *Vance*, 231 F.3d at 259-60 (citing *Davis*, 526 U.S. at 642). More specifically,

> the Supreme Court stated that a plaintiff may demonstrate defendant's deliberate indifference "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."

Vance, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). The *Vance* court continued:

> The recipient is not required to "remedy" sexual harassment nor ensure that students conform their conduct to certain rules, but rather, "*the recipient must merely respond to known peer*

> *harassment in a manner that is not clearly unreasonable.*" *Davis*, 526 U.S. at 648-49, 119 S.Ct. 1661. *The deliberate indifference standard "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.*" *Id.* at 648, 119 S.Ct. 1661. The standard does not mean that recipients must expel every student accused of misconduct. *See id.* Victims do not have a right to particular remedial demands. *See id.* Furthermore, courts should not second guess the disciplinary decisions that school administrators make. *See id.*
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> "The Supreme Court has pointedly reminded us, however, that this is 'not a mere "reasonableness" standard' that transforms every school disciplinary decision into a jury question." *Gant [v. Walling-ford Bd. of Educ.]*, 195 F.3d [134,] 141 [(2d Cir.1999)] (quoting *Davis*, 526 U.S. at 649, 119 S.Ct. 161). In an appropriate case, there is no reason why courts on a motion for directed verdict could not identify a response as not "clearly unreasonable" as a matter of law. See *Gant*, 195 F.3d at 141.

Vance, 231 F.3d at 260 (emphasis added).

In this case, Plaintiffs argue that once Hudson Area Schools had notice of harassment, the district was required to take (a) immediate and appropriate steps to investigate or otherwise determine what occurred, and (b) prompt and effective remedial steps reasonably

calculated to end any harassment, eliminate the hostile environment if one was created, and prevent harassment from occurring again. The Supreme Court has stated that when discrimination has been determined to occur (such as when sexual harassment occurs), the responsible party has a duty to take reasonable, timely, age appropriate, and effective corrective action. *See Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288 (1998). When a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of these circumstances to eliminate the behavior. *Williams v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 364 (6thCir. 2005). It is clear that deliberate indifference exists if a district's responses are so inadequate that students undergo harassment or are made more vulnerable to it as a result of the district's responses. *Davis*, 526 U.S. at 645; *Williams*, 400 F.3d at 367. In the instant case, the Court finds that administrators at Hudson Area Schools repeatedly took adequate and effective remedial action reasonably calculated to end harassment, eliminate the hostile environment and prevent harassment from occurring again. The Court also concludes that, as a matter of law, Defendants' responses were not clearly unreasonable in light of known circumstances.

First, in each situation where there was a complaint by the Plaintiffs or Dane, administrators at Hudson Area Schools took action by investigating the incident and, if the perpetrator was identifiable, reprimanding the perpetrator and imposing the punishment the administrators deemed appropriate under the circumstances. In some instances, punishment meant a verbal reprimand and/or extracting an apology from the perpetrator(s), which

was the case for: (1) the three students who teased Dane in ninth grade about Mr. Clean, (2) Joe, the student who defaced Dane's planner, (3) Kyle, one of the students who put the Mr. Clean poster up, and (4) the student who used note cards in history class. In some instances, punishment meant a suspension (*e.g.*, for Jeff, the other student who put the Mr. Clean poster on Dane's locker). Finally, in one case, it meant expulsion (for Lance, the student who perpetrated the teabagging incident in the locker room). In each situation, it is undisputed that the perpetrator (whatever his or her form of punishment) did not cause Dane any further problems.

Plaintiffs next argue that Defendants have allowed a known environment of sexual harassment to permeate throughout the Hudson Area Schools for years and have failed to respond to this problem. It is undisputed that a survey conducted of Hudson Area School students in 2002 revealed that sexual harassment was a persistent issue in the Hudson Schools. It is also undisputed that following the 2002 survey, Ms. Mansfield recommended two programs specifically intended to address the issue of harassment in the schools but Defendant Kathy Malnar, Superintendent of the Hudson Area Schools ("Superintendent Malnar"), chose not to pursue those recommendations. Plaintiffs have submitted affidavits of students, former students, parents, teachers and Ms. Mansfield, among others, who have offered their viewpoints that Hudson Area Schools had an environment of (a) profanity, (b) sexually derogatory treatment of students by other students, (c) jostling and pushing of students into lockers by other students, and (d) allowing certain students to be picked on and teased before and after school and between classes (all

of which allegedly goes unsupervised because teachers do not have a presence in the hallways).[4] Plaintiffs also assert that notwithstanding their complaints, nothing had changed by the end of the 2004-05 school year. Plaintiffs argue that, in light of this known environment of "sexual" harassment and Superintendent Malnar's choice not to pursue Ms. Mansfield's recommendations, Defendants' responses have been clearly unreasonable and reflect deliberate indifference of Defendants. The Court disagrees.

First, the Hudson Area Schools school board adopted a three page policy prohibiting harassment in 2002, including sexual harassment.[5] Second, this is not a case where Ms. Mansfield's recommendations following the 2002 survey were ignored. Rather, Superintendent Malnar rejected the recommendations of Ms. Mansfield because, as she told Ms. Mansfield, Superintendent Malnar did not believe the recommendations would work. Third, although Ms.

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[4] Interestingly, the affidavits make it clear that the labels "gay," "fag," "faggot," "queer," etc. were directed at many students and not solely at Dane. The affidavits also reveal that the other forms of poor and mean spirited behavior (pushing and shoving, teasing, etc.) also were directed at many students other than Dane.

[5] Under that policy, "Sexual Harassment may include, but is not limited to:

A. verbal harassment or abuse;
B. pressure for sexual activity;
C. repeated remarks with sexual or demeaning implications;
D. unwelcome touching;
E. sexual jokes, posters, cartoons, etc.;
F. suggesting or demanding sexual involvement, accompanied by implied or explicit threats concerning one's grades, safety, job, or performance of public duties."

Mansfield's recommendations were not pursued, Superintendent Malnar and the Hudson Area Schools took many actions during the time Dane attended Hudson Area Schools to address the issues Plaintiffs cite. For example, Superintendent Malnar opted to focus on character development by bringing in speakers to address the issue, both with students and with staff. Moreover, not all programs proposed by Ms. Mansfield were rejected. Ms. Mansfield spearheaded several initiatives aimed at addressing student conduct while Dane attended Hudson Middle School and Hudson High School. Ms. Mansfield initiated the "Flirting and Hurting Program," which addressed sexual harassment and bullying; the "CATS Program," which addressed dating, bullying, and peer pressure; the "Peer Mediation Program," where students were trained to effectively mediate student problems; and "Positive Peers," which was a mentoring service aimed at addressing kindness, bullying, peer pressure, and conflict resolution.

Fourth, while Dane attended Hudson Area Schools, Hudson Area Schools had specific policies regarding hallway, lunchroom, and locker room supervision. These policies require supervision at all times by teachers and administrators based on shifts. School district administrators and teachers were advised of, and trained on, the above policies. During in-service training sessions held at the beginning of the school year, staff were provided with copies of the Hudson Area Schools' policies regarding student conduct and spend significant time discussing appropriate student conduct, which includes bullying, sexual harassment, harassment, and assaults. Teachers and administrators also attended and participated in several school programs designed to educate on

bullying and harassment, such as "Character Counts," "40 Developmental Assets," and "Bang, Bang, You're Dead."

Fifth, students also were instructed on the policies and acceptable conduct while attending Hudson Area Schools. At the beginning of each school year, students were provided with a copy of the student code of conduct and teachers spent a portion of the first day of class discussing with the students the student handbook, including the student code of conduct. Beginning in 2000, a student conduct component was added to the Health class curriculum, and this component specifically addressed issues of bullying and harassment.

Finally, in addition to the disciplinary reprimands and punishments imposed on students for the incidents described above (all of which resulted in Dane being left alone by those students), administrators took a number of steps to assist Dane in dealing with the issues he faced in their schools. For example, as Plaintiffs acknowledge, (1) while Dane was in seventh grade, Principal Rozeveld offered to meet with Dane at the end of each day, (2) Ms. Mansfield repeatedly offered to have Dane participate in a group meeting at the school that allowed students to discuss/work through issues, (3) Ms. Cates and Ms. Mansfield, on their own initiative and despite being rebuffed by Plaintiffs, set up testing for special education services for Dane after seventh grade, (4) the IEPT set up a program for Dane in eighth grade which resulted in a successful year, and (5) in ninth grade, reunited Mr. Adams with Dane, even though Mr. Adams continued to work at the middle school.

While Defendants' actions may not be exactly what Plaintiffs desired and while their actions may not have yielded the results Plaintiffs hoped for, applicable law provides that the Plaintiffs do not have a right to dictate the actions Defendants take. *See Davis*, 526 U.S. at 648. The standard of review for this Court is whether the Defendants acted "clearly unreasonable in light of known circumstances." *Vance*, 231 F.3d at 260 (quoting *Davis*, 526 U.S. at 648). Based on the actions of the Defendants described above, the Court cannot say that the Defendants acted clearly unreasonable or with deliberate indifference to the situations which existed at Hudson Area Schools, generally, or with respect to Dane, specifically.

Next, Plaintiffs focus on the locker room incident as conclusive evidence of the deliberate indifference of the Defendants. Plaintiffs direct the Court's attention to the fact that the sexual assault on Dane was not reported by the Defendants, even though AP Durbin indicated that law enforcement routinely is called the day of, or the day after, some incidents. Plaintiffs argue that the Defendants' failure to timely notify police of the locker room incident demonstrates a hesitation or refusal on the part of the Defendants to enforce sexually oriented violations. The Court notes, however, that the incident occurred after school on a Friday, and no school officials knew about the incident until some time on Saturday (the only school "employee" who knew on Friday was Dane's coach, who also happened to be his brother). Then, as soon as school was back in session on Monday, Defendants initiated an investigation into the locker room incident, and Lance was suspended from school that day. Moreover, as a result of the incident, the Defendants expelled Lance from school, denied his

subsequent application for re-entry and provided information to the police when a criminal investigation was opened. Finally, although Defendants did not call the police about the incident, even the Plaintiffs did not report the incident to police until almost a week after it occurred (the following Thursday) because they wanted to mull it over. Thus, the Court again concludes the Defendants' actions with respect to this incident were not clearly unreasonable or deliberately indifferent.

The Court briefly addresses several other arguments raised by Plaintiffs.[6] With respect to the teabagging incident in the locker room, Plaintiffs argue that (1) coaches have not supervised the locker rooms in the Hudson Area Schools for years, (2) Defendants have never compelled coaches to do so, (3) even though such supervision is required by Hudson Area Schools policy. Plaintiffs do not, however, offer any proof (or even any allegations) that Defendants had any knowledge of the alleged lack of supervision in the locker rooms. Next, the Court notes that Plaintiffs make much of the fact that "everyone" who worked for Hudson Area Schools characterized the anti-harassment policy as a zero tolerance policy. Plaintiffs argue that because every teacher deposed testified to knowledge of verbal sexual harassment occurring regularly within the schools, the cries of zero tolerance ring hollow. Plaintiffs also point to a 2005 survey of the environment at Hudson Area Schools that

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[6] Plaintiffs spent a fair portion of their briefs addressing the impact the harassment had on Dane. While this "evidence" is relevant to the issue of whether Dane has been denied equal access to an educational program, it is not relevant in evaluating the deliberate indifference prong of *Davis*.

concludes sexual harassment and bullying remained issues at Hudson Area Schools. Plaintiffs further rely on affidavits of students and third party adults that Plaintiffs essentially suggest that "upon entering the Hudson Area Schools, any person quickly would be able to discern a high level of sexual harassment." As the *Davis* Court recognized, however, the deliberate indifference standard "does not mean that recipients can avoid liability only by purging the schools of actionable peer harassment or that administration must engage in particular disciplinary action." *Davis*, 526 U.S. at 648. Rather, recipients can avoid liability by responding "to known peer harassment in a manner that is not clearly unreasonable[,]" which the Court holds the Defendants did in this case, as discussed above. *Davis*, 526 U.S. at 648-49.

Plaintiffs also complain that they (and/or Dane) frequently were told by administrators at Hudson Area Schools that there was nothing that could be done about alleged sexual harassment unless names and proof of the perpetrators could be provided or determined. The Court fails to see how the Defendants' position could be considered deliberately indifferent. If the alleged perpetrators were not identified (either by Dane, the Plaintiffs or persons interviewed by administrators in conducting their investigations), the administration would have been powerless to discipline or punish students without violating their constitutional rights.

Finally, Plaintiffs direct the Court's attention to seemingly every "ugly" incident in the Hudson Area Schools during Dane's academic career, presumably in an attempt to color the Court's view of the Defendants. Without question, there are many things cited by the

Plaintiffs that the Court would not condone in an academic (or professional) setting. Some of the things cited by Plaintiffs, however, have absolutely no bearing on this case or the issue at hand. For example, a teacher who swears in class may be a sad commentary on the teacher and/or the school system, but it is not probative to the Plaintiffs' cause of action. Likewise, while the alleged "ongoing pervasive harassment of children not in the 'in crowd'" is not to be condoned, it does not form the basis of a sexual harassment suit rooted in deliberate indifference. Furthermore, the fact that the administration may have been "soft" on proactive measures does not demonstrate that they were deliberately indifferent. Again, applicable law requires only that Defendants respond "to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-49.

For the foregoing reasons, the Court holds that Defendants were not deliberately indifferent to the alleged sexual harassment against Dane because their actions were not clearly unreasonable in light of known circumstances. Accordingly, the Court concludes that Plaintiffs' Title IX claim fails as a matter of law and GRANTS Defendants' Motion for Summary Judgment on Plaintiffs' Title IX claim.

B. Equal Protection Claim

"The Equal Protection Clause requires public institutions to 'treat similarly situated individuals in a similar manner.'" *Wayne v. Shadowen*, 15 Fed.Appx. 271 (6th Cir. 2001) (quoting *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1360 (6th Cir. 1996)). "In opposition to a motion for summary judgment, it is plaintiff who possesses the burden of demonstrating

that defendants treated similarly situated individuals in a disparate manner." *Buchanan*, 99 F.3d at 1360. In this case, Plaintiffs make no allegation that similarly situated individuals exist. Plaintiffs certainly do not identify any such persons. The Court therefore concludes that Plaintiffs have not shown that there were any similarly situated individuals who were treated differently. Accordingly, the Court holds that Plaintiffs have not met their burden on their Equal Protection claim and GRANTS Defendants' Motion for Summary Judgment on that claim.

CONCLUSION

Accordingly, and for the reasons set forth above, Defendants' Motion for Summary Judgment is GRANTED. Plaintiffs' cause of action is therefore DISMISSED WITH PREJUDICE. Judgment shall be entered accordingly.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

Dated: November 28, 2007

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1008

[Filed May 1, 2009]

DAVID PATTERSON, ET AL.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
HUDSON AREA SCHOOLS, ET AL.,	)
	)
Defendants-Appellees.	)
	)

ORDER

BEFORE: MOORE and WHITE, Circuit Judges; and VINSON,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of

* Hon. C. Roger Vinson, United States District Judge for the Northern District of Florida, sitting by designation.

the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Vinson would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX D

Interrogatory Response 17

17 Due to Mr. Adams being a middle school resource room teacher, Dane would not be able to have Mr. Adams for ninth grade. Therefore, we decided not to place Dane with another high school resource room teacher, Dane would attempt the year on his own. Mr. Adams agreed to keep an eye out for Dane as much as possible. It was agreed by the IEP team that this was best case scenario for Dane. For Dane to receive Resource Room services in the high school, would require him being placed with other EI students and would further the bullying.

APPENDIX E

[SEE FOLDOUT PAGES FOR INDIVIDUALIZED EDUCATION PROGRAM]

INDIVIDUALIZED EDUCATION PROGRAM

Lenawee Intermediate School District, 2946 Sutton Road, Adrian, MI 49221
Phone: (517) 263-8931 Fax: (517) 263-2890 http:lisd.k12.mi.us
Toll Free: (888) 444-8144

Student Information:

Lenawee ISD Use Only
Date Rec'd: NOV 30 2004
Regional Supervisor's Initials
RMS Input Date 12/1/09 Dm

Date of Meeting (inc. reconvened dates too)	Last IEP Date	Birthdate	Ethnic Group	Gender	Grade	Student's Native Language
SUSPENDED 5/20/04 / 11-9-04	8-26-03	[redacted]-90	Cauc	☒M ☐F	9	English

Student's Last Name	First Name	Initial	Student ID # (Social Security #)	Home Telephone
Patterson	DANE			448-5544

Student's Home Address	City	State	Zip Code
[redacted]	Hudson	MI	[redacted]

Parent Information:

Parent/Guardian/Surrogate Last Name	First Name	Parent's Native Language
Patterson	David & Dena	English

Parent Address (*if different than student*)	Telephone Work	Home
SAME		

Parent/Guardian/Surrogate Last Name	First Name	Parent's Native Language

Parent Address (*if different than student and other parent above*)	Telephone Work	Home

District Information:

Resident District	Operating District ☐ Check if "School of Choice"	Attending Building
Hudson	Hudson	Hudson H.S.

Purpose(s) of this IEP Team meeting (*more than one box may be checked*) —

☐ Initial IEP ☒ Review/Revise ☐ Redetermination/Change of Eligibility ☐ Transition ☐ Other: _____

Parent Contact - Professional personnel contacted parents to arrange a mutually agreeable time and place for the IEP Team meeting and to explain the purpose of the meeting and the roles of each participant.

Method of contact: Phone By Adams Date 11-4-04 Result Accepted / ATTENDED

If the parent could *not* be reached to arrange a mutually agreed upon time and place, an additional contact(s) was made:

Method of contact: _____ By _____ Date _____ Result _____

IEP Team Meeting Participants in Attendance (*sign in for attendance purposes only*)

Student	General Education Teacher: Matt Reinsche
Parent/Guardian/Surrogate: Dena Patterson	Special Education Teacher/Service Provider: Ted Z Adams
Parent/Guardian/Surrogate: D B	Other/Title/Role
MET Representative (Someone who can interpret evaluation results)	Other/Title/Role: Amy Vincent, SSW
District Representative/Designee: Michael Thomas, Principal	Other/Title/Role

Educational Performance Evaluation Information: The IEP Team:

☒ considered the results of the initial evaluation or most recent re-evaluation of the student. (*Attach SE-102*)

☒ as appropriate, considered the results of the student performance on any general state or district-wide assessments: (*Describe*)

MEAP RESULTS when available

Student Profile and Progress *Consider (check) each item listed below. The written descriptions are optional*

☒ Student strengths, concerns and priorities were considered. Describe: Working hard academically, advocating for self, developing solid social skills, grades improving.

☒ Parent input and concerns for enhancing the education of the student were considered. Describe: That Dane continue to succeed academically, emotionally, and socially. That Dane feel comfortable in his school surroundings.

☒ Address the student's anticipated needs or other matters. Describe: Additional help in Math to succeed may be necessary.

Review both the student's ☒ progress toward current IEP annual goals and objectives, and ☒ progress in the general curriculum, where appropriate. ☐ See attached progress reports. Describe:

Present Levels of Educational Performance: Provide a statement of the student's present levels of educational performance. What is the student's level of functioning? Describe how the student's disability affects involvement and progress in the general curriculum. What information relates to the need for related services? See also the Goals & Objectives page(s). (*use the "blank" form 9 if more room is needed*). *For preschool children, as appropriate, describe how the disability affects the student's participation in appropriate activities.*

Dane is still being treated for anxiety issues. Dane's high level of anxiety causes difficulty in academic areas and requires support from resource room for reassurance and success in his classes. When stressful situations arise at school, Dane will use Resource Room/School Social Work services to refocus and gain needed support to succeed and overcome issues.

Student Eligibility: Most recent MET report date or latest date the Evaluation Review determined eligibility: 3-25-03

This IEP team determines this student to be **ELIGIBLE** due to (below). *OR* → ☐ **INELIGIBLE** (go to signature page)

☐ Cognitive Impairment R340.1705	☐ Physical Impairment R340.1709	☐ Learning Disabled R340.1713
☒ Emotional Impairment R340.1706	☐ Other Health Impairment R340.1709a	☐ Severe Multiple Impairment R340.1714
☐ Hearing Impairment R340.1707	☐ Speech & Language Impairment R340.1710	☐ Autism R340.1715
☐ Visual Impairment R340.1708	☐ Early Childhood Developmental Delay R340.1711	☐ Traumatic Brain Injury R340.1716

Secondary disability, if any: _____

Reporting Progress: ☒ The parents will be regularly informed *in writing* of progress on goals and objectives of this IEP *at the regular reporting periods* applicable to general education students. Expected reporting frequency: 8X per year
☐ *Unique additional progress reporting:* How: When:

Supplementary Aids and Services

Provide a statement of the supplemental aids and services to be provided to the student, or on behalf of the student, and a statement of the program modification, accommodations or supports for school personnel that will be provided for the student:

- To advance appropriately toward attaining the annual goals;
- To be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities;
- To be educated and participate in activities with other students, both with and without disabilities;

Also you must consider these special factors:

- Positive behavioral support for students whose behavior impedes the learning of self or others
- Language needs for students with limited English proficiency
- The need for Braille instruction for students who are visually impaired
- Needs related to language and communication for students who are deaf or hard of hearing
- Communication needs of this student
- Requirement for assistive technology for this student
- Any other anticipated needs

☒ The IEP Team has considered the special factors above. Needed accommodations or modifications are listed below.
(If none, write "None")

Supplementary Aids/Accommodations/Modifications/Services	Amount of Time & Frequency	Location
Alternate site for tests/quizzes	As needed throughout school day	Resource Room as needed
Resource Room for Crisis intervention	Daily as needed	Resource Room as needed

All supplementary aids and services will be provided for the duration of this IEP, excluding summer/other school breaks, unless indicated above.

Least Restrictive Environment This student will:

- Fully participate with students who are nondisabled in the general education setting except for the time spent in separate special education programs/services provided outside of the general education classroom as specified in this IEP.

☒ Yes ☐ No (explain):

- Be fully involved in and progress in the general curriculum.

☒ Yes ☐ No (explain):

- Have the same opportunity as general education students to participate in nonacademic and extracurricular activities.

☒ Yes ☐ No (explain):

Dissenting Report : Any participant in the Committee's deliberations who disagrees, in whole or in part, with the committee's determination of eligibility and/or placement, may indicate the reasons therefore on the committee's Individualized Education Program report (*Form No. 3*) or may submit a written statement to be attached to the report. Review this statement at the conclusion of the IEP Team meeting.

Student Name Dane Patterson Birthdate [redacted]/90 Date of IEP 5-20-04 Page 3

Annual Goals and Short-Term Objectives & Progress Reports (*alternative format for Report Form No. 3*) Refer to the present level of educational performance and develop measurable annual goals or short-term objectives related to: meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum; and meeting each of the student's other educational needs that result from the student's disability. (*Permissible to refer to Michigan Curriculum Frameworks*)

Present Levels of Education Performance: Dane has difficulty with task completion (consistency) & turning in completed work

Annual Goal: To pass all classes with a "C" or better grade

Short-Term Objectives (min. 2 per annual goal)	Evaluation Procedures	Performance Criteria	Schedules for Evaluation	Marking/Assessment Period or Insert Date of Progress Report (Report of Progress)
1. Will complete & hand in all assignments on time with a 70% or better grade	daily work & weekly assignments Test/Quizzes	99% accuracy	consistent with general ed. 8x per year	
2. Will advocate for self by making arrangements with teachers for testing/assignment completion when needed.	daily weekly Tests/Quizzes	99% accuracy	consistently/ general ed. 8X per year	

Present Levels of Education Performance: _____

Annual Goal: _____

Short-Term Objectives (min. 2 per annual goal)	Evaluation Procedures	Performance Criteria	Schedules for Evaluation	Marking/Assessment Period or Insert Date of Progress Report (Report of Progress)
1.				
2.				

Evaluation	Criterion	Schedule
S Student's Daily Work	____% Accuracy	W Weekly
D Documented Observation	__of__ Rate	D Daily
R Rating Scale	____ Achievement Level	M Monthly
T Standardized Test	Other (specify above)	G Grading Period
O Other (specify above)		C Consistent with Gen'l Ed.
		O Other (specify above)

Status of Progress on Objectives

1 Achieved/Maintained
2 Progressing at a rate sufficient to meet the annual goal for this objective
3 Progressing below a rate sufficient to meet the annual goal for this objective (explain above)
4 Not applicable during this reporting period
5 Other (specify above)

Individualized Educational Program Team Report Form No. 3a Make copies for other service providers! Form SE-110 Oct 2003 Ver. 1
Copy distribution: WHITE - Lenawee ISD; YELLOW - Special Educator; PINK - Parent(s); GOLD - Local District (CA file)

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Special Education Programs/Ancillary and Other Related Services

Program/Service (Rule description)	Rule Number	Amount of Time and Frequency of Program or Service	Beginning Mo/Day/Yr	Ending Mo/Day/Yr	Location
Resource Room	340.17 496	20-30 minutes per week	11-9-04	11-9-05	AHS
	340.17				
	340.17				
	340.17				
Social Work	34 CFR 300.24	1-2 x per month as needed 20-30 min. session.	11-9-04	11-9-05	HHS
	34 CFR 300.24				

☐ All programs and services listed above will begin on the initiation date of the IEP and continue for one calendar year, following the approved school district calendar. Extended school year (ESY) services must be provided only if the IEP Team determines on an individual basis that ESY services are necessary for the provision of a free and appropriate public education. Note above any exceptions to beginning and ending dates and locations given above. Describe below:

Is there a need for a SE teacher with a particular endorsement? ☒ No ☐ Yes, specify: _____

BLOCKS		OR	HOURS/PERIODS
Blocks per ☐ ___ Week(s) or ☐ Semester in School		Total Hours/Periods per Week in School	
Total/Range Blocks in Special Ed		Total/Range Hours/Periods/Week in Special Ed	
Total/Range Blocks in General Ed		Total/Range Hours/Periods/Week in General Ed	

Elementary or Secondary Departmentalized Program: ☐ Yes or ☐ No

Resource Program: If the student's eligibility is different than the teacher endorsement, are teacher consultant services needed for the resource room teacher [R340.1749b(4)]? ☐ Yes or ☒ No

Transportation: Is specialized transportation required? ☒ No ☐ Yes, specifics required: _____

Programs offered and rejected by the parent because the parent elected to enroll the student in a nonpublic school
_____ *Parent's Initals* _____

Assessment Participation: ☒ MEAP, MI-Access are not given at the age/grade levels covered by this IEP

Statewide Assessment	Assessment appropriate? yes	no	If yes, list appropriate assessment accommodations if needed. If no, state the reason why the MEAP subject area is inappropriate and indicate the appropriate alternate/MI-Access assessment.	standard accommodations? yes	no
MEAP					
English Language Arts	☐	☐		☐	☐
Math	☐	☐		☐	☐
Science	☐	☐		☐	☐
Social Studies	☐	☐		☐	☐
MI-Access					
Eligible for Phase 2	☐	☐			
Supported Independence	☐	☐			
Participation	☐	☐			

☒ District wide assessments are not given at the age/grade levels covered by this IEP

Districtwide	Assessment appropriate? yes	no	If yes, list appropriate assessment accommodations if needed. If no, state the reason why the district wide assessment is inappropriate and indicate the appropriate alternate assessment.
	☐	☐	
	☐	☐	
	☐	☐	

Prevocational/Vocational Considerations ☒ Beginning at age 12 (*consider at age 11*), the student's prevocational/vocational needs were considered.

Transition (*This form is required for students turning 14 during the duration of this IEP, it is optional for younger students*)

☒ The student was invited to the transition IEP Team meeting. (*See SE 105 Invitation Letter*)

☒ The student provided input regarding preferences and interests.

The student attended the meeting ☐ Yes or ☒ No. If No, describe how the Team considered the student's preferences and interests:

Parent interview / Student interview / Conversations w/staff members

If a student will turn age 14 (*or younger if appropriate*) during the implementation of this IEP, the Team must make a statement of the transition service needs that focuses on the student's *course of study* (*Ex. attach current Educational Development Plan - EDP*). Describe the student's *course of study* and transition service needs.

Regular Ed. Curriculum leading to a H.S. Diploma.

Statement of Needed Transition Services -- include by age 16 (*consider at age 15 if determined appropriate by IEP Team*)

DAILY LIVING SKILLS
(Considerations: self-care, future housing options, mobility/transportation, income and finances, and medical needs)

As an adult, where do you want to live?

Our Plan for This Year	☒ None needed. Student has adequate skills.	Person/Agency Responsible

GETTING READY FOR EMPLOYMENT
(Considerations: related education, vocational training, and work-study)

After you finish school, what kind of work do you want to have?

Our Plan for This Year	☒ None needed. Student has adequate skills.	Person/Agency Responsible

COMMUNITY INVOLVEMENT
(Considerations: recreation/leisure activities, development of personal/social skills, and awareness of community resources)

As an adult, what hobbies and activities do you want to have?

Our Plan for This Year	☒ None needed. Student has adequate skills.	Person/Agency Responsible

INSTRUCTION AND RELATED SERVICES
(Considerations: planning, academic adaptations, college readiness, and related services needed for transition)

After high school, what additional education or training do you want to pursue? College

Our Plan for This Year	☒ None needed. Student has adequate skills.	Person/Agency Responsible

A representative from any other agency likely to be responsible for providing or paying for transition services listed above was invited to attend this IEP Team meeting.

Agency Contacted N/A Contacted By _____

Method of Contact _____ Date _____

Agency Contacted _____ Contacted By _____

Method of Contact _____ Date _____

Parental Rights and Age of Majority (Check all applicable)

☐ **If the student will be age 17 during this IEP, the student was informed of parental rights that will transfer to him/her at age 18**

☐ **If the student has turned age 18 the student and parent were informed of the parental rights that transferred to the student at age 18**

☐ **The student has turned age 18 and there is a guardian established by court order. The guardian is:**

Resident District Commitment

Resident district superintendent/designee (*check all that apply*):

☑ Agree with the IEP and its implementation. ☐ Agree that the student is not eligible for special education.

☐ Does not agree with this IEP and requests: ○Mediation, *and/or* ○ an impartial due process hearing.

☐ The student is attending a program operated by a nonresident district and the resident district superintendent/designee authorizes the operating district to conduct subsequent IEP Team meetings and a contract is on file or will be completed.

Signed: Michael Osborne Date: 11/9/04
Resident District Superintendent or Designee (month/date/year)

Non-resident Operating District Commitment *(to be used when authorized by Resident District.)*

The student is attending a program outside of resident district and the operating district superintendent/designee (*check all that apply*):

☐ Agree to provide the IEP program(s) and/or service(s) and a contract is on file.

☐ Agree to conduct subsequent IEP Team meetings. ☐ Agree that the student is not eligible for special education.

☐ Does not agree with this IEP and requests: ○Mediation, *and/or* ○ an impartial due process hearing.

Signed: _____ Date: _____
Operating District Superintendent or Designee (month/date/year)

Parent/Guardian/Surrogate Consent (*Check all that apply*) As the "Parent," I (*or "we"*):

☒ Understand the contents of this plan. ☐ Have been given sources *(names & phone numbers)* to contact to obtain assistance.

☒ Have been informed of my rights (*procedural safeguards via written document*).

☒ Agree with this plan. ☐ Agree that the student is not eligible for special education.

☐ Do not agree with this plan *but* will allow it to be used.

☐ Do not agree with this plan and request: ○Mediation, *and/or* ○ an impartial due process hearing, attach specific description of the problem and proposed solution, *see IEP Report Form No. 14.*

Parent Signature(s): Dina J. Patterson / W.B. Pat Date: 11-9-04 (month/date/year)

Student Signature*: _____ Date: _____ (month/date/year)

Parent signature is required for initial placement in special education. *"Parent" also means the person with disability when the person reaches 18 years of age, if a legal guardian has not been appointed by appropriate court proceedings.

Additional Notice Requirements. The Superintendent or designee of the operating district assures:

(a) to the maximum extent appropriate, a person who has a disability, including a person who is assigned to a public or private institution or other care facility, is educated with persons who do not have disabilities.
(b) placement of a person who has a disability in special classes, separate schools, or the removal of a person who has a disability from the general education environment occurs only when the nature or severity of the disability is such that education in a regular class using supplementary aids and services cannot be satisfactorily achieved.
(c) the placement for the student is as close as possible to his or her home.
(d) unless the IEP of a student with a disability requires some other arrangement, the student is educated in the school that he or she would attend if non-disabled.
(e) in selecting the least restrictive environment, consideration shall be given to any potentially harmful effects to the student or the quality of services that the student needs.
(f) a child with a disability will not be removed from education in age-appropriate regular classrooms solely because of needed accommodations in the general curriculum.

Location (*building*) of program(s) and/or service(s): Hudson High School

Person responsible for implementation/Service Coordination: Mike Osborne/T. Adams Implementation date: 11-9-04

Grade at Implementation 9. All programs and services begin on this date unless otherwise noted in this IEP, see Form No. 5.

Signed: Michael Osborne Date: 11/9/04
Resident or Operating District Superintendent or Designee (month/date/year)

Additional Information Page *(optional page)*

Use this page to document or further explain decisions of the Individualized Educational Program Team. You may not need this page, but if you use it, please reference this page at the specific section of the Individualized Educational Plan (i.e. at Individualized Educational Program Team Report Form No. 4, Least Restrictive Environment, if more space were needed write "*see Individualized Educational Program Team Report Form No. 9 for more information*"). This form may also be used to specify responsibility for implementing accommodations and modification from Form No. 4 or for listing the positive behavior interventions, strategies, and supports needed for students whose behavior impedes learning or for referring to an attached Behavior Intervention Plan. It should be noted that adjustments to the behavior interventions, strategies, and supports or Behavior Intervention Plan may be made without reconvening an IEP Team meeting.

Parents concerned about progress in Math - Dane has shared he could benefit from additional support in Math.

Academically Dane is having success and parents would like this continue.

Possible move to a different section of math class so additional support in Math can occur.

Teacher Consultant services will continue from Resource Room.

Social work services continues on an as needed basis.

Student Name Dane Patterson Birthdate [redacted]90 Date of IEP 11-9-04 Page ____

Annual Goals and Short-Term Objectives & Progress Reports (*alternative format for Report Form No. 3*) Refer to the present level of educational performance and develop measurable annual goals or short-term objectives related to: meeting the student's needs that result from the student's disability to enable the student to be involved in and progress in the general curriculum; and meeting each of the student's other educational needs that result from the student's disability (*Permissible to refer to Michigan Curriculum Frameworks*)

Present Levels of Education Performance : Dane struggles with being anxious and overwhelmed by daily life stressors.

Annual Goal: Dane will improve his coping skills and reduce his anxiety towards these stressors.

Short-Term Objectives (*min. 2 per annual goal*)	Evaluation Procedures	Performance Criteria	Schedules for Evaluation	Marking/Assessment Period or Insert Date of Progress Report (*Report of Progress*)
1. In SSW sessions, Dane will identify positive and healthy ways to cope with daily life stressors.	obs/ self report	80%	SSW	
2. In SSW sessions, Dane will identify ways to reduce anxiety levels and implement these skills to help feel ~~better about himself~~.	↓	↓	↓	

Present Levels of Education Performance : ____

Annual Goal: ____

Short-Term Objectives (*min. 2 per annual goal*)	Evaluation Procedures	Performance Criteria	Schedules for Evaluation	Marking/Assessment Period or Insert Date of Progress Report (*Report of Progress*)
1.				
2.				

Evaluation	Criterion	Schedule
S Student's Daily Work D Documented Observation R Rating Scale T Standardized Test O Other (specify above)	____% Accuracy __of__ Rate ____ Achievement Level Other (specify above)	W Weekly D Daily M Monthly G Grading Period C Consistent with Gen'l Ed O Other (specify above)

Status of Progress on Objectives

1 Achieved/Maintained
2 Progressing at a rate sufficient to meet the annual goal for this objective
3 Progressing below a rate sufficient to meet the annual goal for this objective (explain above)
4 Not applicable during this reporting period
5 Other (specify above)

Individualized Educational Program Team Report Form No 3a Make copies for other service providers! *Form SE 110 Oct 2003 Ver. 1*
Copy distribution. WHITE - Lenawee ISD. YELLOW - Special Educator. PINK - Parent(s). GOLD - Local District (CA file)

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(2)

No. 09-143

Supreme Court, U.S.
FILED
AUG 28 2009
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

HUDSON AREA SCHOOLS,

Petitioner,

v.

DAVID PATTERSON and DENA PATTERSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY P. ARNSON
LAW OFFICE OF JEFFREY P. ARNSON, PLLC
6440 East Fulton St.
Suite 201
Ada, MI 49301
(616) 676-3850

TERRY E. HEISS
Counsel of Record
TERRY E. HEISS, P.C.
6440 East Fulton St.
Suite 201
Ada, MI 49301
(616) 676-3850

Counsel for Respondents

224883

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether a school district is entitled to summary judgment as a matter of law on the issue of deliberate indifference to known severe, pervasive, and objectively offensive student-on-student sexual harassment under *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999), where the underlying material facts are in dispute; where taking the evidence in a light most favorable to the non-moving party, the evidence shows the district had knowledge that its remedial actions were ineffective in the face of the continuing harassment, yet the school district continued to use the same ineffective methods; and, where the school district failed to follow its own policies.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed in the caption. Respondents are not corporate entities and are not a subsidiary or affiliate of a publicly owned corporation.

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STATEMENT OF THE CASE

A. The Claim

On November 24, 2005, Respondents, as next friend of Dane Patterson[1], filed a complaint alleging a violation of rights granted to Dane under Title IX of the Education Amendment of the Civil Rights Act of 1972, being 20 U.S.C. § 1681, *et seq.* The complaint alleged a multi-year history of bullying, teasing, and sexual harassment sufficiently severe and pervasive to deny Dane access to the educational opportunities or benefits provided by Hudson Area Schools ("Petitioner"). (Complaint, Sixth Circuit Joint Appendix, *hereafter "JA"*, pg. 12, ¶6, ¶25).

B. Course of Proceedings

Petitioner filed for summary judgment on April 18, 2007. Respondents filed a response on May 9, 2007. The district court issued its Opinion and Order November 28, 2007, finding as to the Title IX claim, (1) Respondents had met their burden as to the first prong of the *Davis*[2] test (i.e. severe, pervasive and objectively offensive conduct), (JA-pgs. 321-323); (2) Petitioner had knowledge of multiple instances of student-on-student sexual harassment of Dane, (JA-pgs. 323-324); but (3) Petitioner was not deliberately indifferent to the sexual harassment against Dane, because its actions were not

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[1] Hereafter referred to as "Dane"

[2] *Davis v. Monroe County. Bd. of Educ.*, 526 U.S. 629, 653; 119 S.Ct. 1661; 143 L.Ed. 2d 839 (1999).

clearly unreasonable in light of known circumstances. (JA-pgs. 324-330).

Respondents appealed to the Sixth Circuit Court, which reversed January 6, 2009. Petitioner's motion for *en banc* review and/or reconsideration was denied May 1, 2009. The essence of the decision of the Sixth Circuit was material issues of fact remain and that summary judgment was inappropriate pending resolution of those factual issues.

C. Counter-Statement of Issue

Contrary to Petitioner's claim, the Majority Opinion[3] in the Sixth Circuit found the facts proffered by Petitioner, as "effective responses to complaints of harassment, policies prohibiting harassment, and instituting programs teaching the students the danger of harassment" (Petition, pg. 2), were in dispute which must be resolved at trial. *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009). The court *did not* require schools to "remedy" all offensive behavior, but instead questioned claims of undisputed factual assertions offered by the Petitioner. The Majority did not alter the holding of this Honorable Court in *Davis*, nor is it inconsistent with its own holding in *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000).

Just as in the Sixth Circuit, Petitioner submits a pleading in which the offered statement of fact is replete with references not cited to the record, contains

[3] Hereafter "Majority"

numerous factual, errors cites to references which do not support the claimed fact, or take one fact from one academic year and apply it to multiple years. From pages 5-9, there are at least sixteen factual claims not supported by a citation to the record.

D. Factual Disputes

The following is a list of some significant factual contradictions:

1. Petition, pg. 3: Petitioner claims all perpetrators, once identified, were disciplined. The record fails to show any perpetrator named in 6th and 7th grades was disciplined. *Infra* at 11-12. Most perpetrators in 9th grade, especially the daily harassers, also went undisciplined. *Infra* at 14-18. Unless Respondents had corroborating evidence, Petitioner refused to take action. (See example, JA-pg. 714). Rather than support Dane, Petitioner's staff discouraged complaints with responses such as (1) "kids will be kids", (2) "addressing things will only make it worse", (3) "we don't have enough proof and can't do anything about it", and (4) "are you sure you want me to do something with these kids because of the retaliation factor". (Dane, JA-pgs. 672, 704-705, 714; David Patterson[4], JA-pgs. 802-803). According to Dr. Warwick, Dane's counselor, the Petitioner treated Dane "as if he was the problem". (JA-pg. 174, ¶28).

[4] Hereafter referred to as "David"

2. Petition, pg. 3: Petitioner claims a proactive and vigorous history of investigation and disciplinary responses to sexual harassment. Respondents disagree.

   a. Contrary to its own policy (Code, JA-pg. 309), Petitioner did not call the police after Dane was sexually assaulted, refusing Dane's request for Petitioner to call so he would not bear that burden and the issues it presented. (Dena Patterson[5], JA-pgs. 865-866). The police report confirms Dena is the complainant. (JA-pg. 259).

   b. Petitioner's records demonstrate only *one* set of investigative notes or reports for the three year period of harassment and only in relationship to the sexual assault. (JA-pgs. 263-265). This lack of reporting undercuts any claim of vigorous investigation.

   c. As to the defacement of Dane's main locker, *Infra* at 16, Dane provided names of two potential perpetrators, Derrick G. and Kyle M. (Dane, JA-pgs. 712-715). While conducting his "vigorous" investigation, Assistant Principal Durbin never bothered to interview either student. (Durbin, JA-pg. 433).

   d. More often than not, Petitioner violated its own disciplinary policies, *Infra* at 11-15; 20-

[5] Hereafter "Dena"

24, thereby creating a perception within the student body that nothing would be done in response to bullying and harassment. *Infra* at 25-27.

3. Petition, pg 3: Petitioner's claim, that it provided multiple services, has been highly disputed by Respondents in the Sixth Circuit.

   a. As part of its legal duty to evaluate Dane for special education services, Petitioner conducted an evaluation during the summer after Dane's horrendous and devastating 7th grade year. (Cates, JA-pgs. 367-370; Dena, Appendix-pgs. 9a-10a). This event was a one-time reactive response to Dane's emotional deterioration, not a proactive measure. Nothing in the 8th or 9th grade Individual Educational Plan (IEP) directly addressed measures to protect Dane from harassment by using such things as a para-professional, an escort between classes, or special reporting procedures. (JA-pgs. 39-47, 216-224).

   b. Though Petitioner provided IEPs, the record clearly indicates Petitioner failed in their implementation for 9th and 10th grade. (Warwick, JA-pg. 173-176, ¶22-36).

   c. Susan Mansfield did not provide services to Dane as part of an IEP (JA-pgs. 39-47; 216-224), nor did she personally invite Dane to attend individual or group counseling

sessions. Rather, she made a generalized statement to 7th and 8th grade students informing them of available services. (Mansfield, JA-pgs. 470-471). *Ms. Mansfield acknowledged Dane not accessing those services was appropriate. (JA-pgs. 471-472). Further, Dane did not have the capacity to self-advocate, which precluded him from using services that required him to initiate contact.* (Warwick, JA-pg. 174, ¶29-31).

d. Petitioner's claim Dane was given preferential seating to avoid his tormentors is without merit. The 8th grade IEP (2003-2004) states: "Seating preference, if needed, extra time on tests, if needed." (JA-pg. 41). No reference is made anywhere in this IEP to that action being implemented for Dane to avoid harassers. *The 9th grade IEP makes no reference to preferential seating.* (JA-pgs. 216-224).

e. Respondents did not refuse services as alleged. Neither psychology nor counseling services were part of the IEP. (JA-pgs. 39-47; 216-224). Social work services were not designated as "group" on the IEP. (*Id.*). Tammy Cates testified a portion of Dane's permanent records were missing, including attendance records and complete interview notes. (JA-pgs. 371-372). Though the 8th grade IEP called for social work services two to four times per month (JA-pg. 42), Ms. Cates acknowledged missing

appointments and possibly cancelling "groups". (JA-pgs. 371-372, 380-381). Instead she relied on Dane, who could not self-advocate, *Supra* at 6, to be the primary initiator of services.

f. The Petitioner suggests Respondents did not cooperate in dealing with issues of sexual harassment and special education services. The facts are against Petitioner on this point. Susie Mansfield testified Respondents acted appropriately in relying on Dr. Warwick as Dane's primary mental health provider. (JA-pgs. 470-471, 508, 518-519). Dane's not accessing her group sessions was appropriate. (*Id.*). Ted Adams wrote Respondents fully cooperated with Petitioner regarding Dane. (JA-pg. 272). His testimony confirms this point. (Adams, Appendix-pgs. 1a-2a).

g. Petitioner asserts "Plaintiffs' parents refused to allow [Dane] to meet with the High School resource teacher." (Petition, pg. 10). *This unreferenced allegation* is false and contradicted by Dena, (JA-pg. 855), and the Adams' letter which states the *IEP team* decided against placing Dane in the resource room for 9th grade. (JA-pg. 271).

h. Petitioner's claim of providing resource room services to Dane for 9th grade is also misconstrued. Initially, Petitioner refused to allow Dane to be assigned to Mr. Adams in

9th grade in the manner assigned in 8th grade. (Dena, JA-pg. 855). Principal Osborne did not believe Dane should be in the resource room for 9th grade. (*Id.* at 856). After Respondents begged Mr. Osborne, he agreed to allocate 20-30 minutes each week for Dane to meet with Mr. Adams for consulting services, which were called "resource room" in the IEP. (Dena, Appendix-pgs. 10a-25a; Adams, JA-pgs. 339-340).

4. Petition, pg. 31: No evidence suggests "teachers agreed to be extra vigilant in looking after Dane." Sixth grade teachers did discuss with Respondents their intention to "observe the situation and try to handle it" (Dena, JA-pg. 813), however, such is far from "vigilance". No similar expression was rendered by 7th, 8th, or 9th grade teachers.

5. Petition, pg. 31: "Teachers" did not offer suggestions to help Dane better cope with his peer related problems. Rather, one 7th grade teacher, Scott Marry, suggested Dane seek out extra curricular activities, such as Science Olympiad, to help with socialization (JA-pg. 525), which Dane was already participating in. (David, JA-pg. 696).

6. Petition pg. 31: Though principal Rozeveld offered in 7th grade to help Dane, he ceased being available after the first day. (Dena, JA-pgs. 844-849).

7. The 8th grade IEP states: "Dane received below average grades in most academic subjects" (JA-pg. 40), which contradicts the Petitioner's claim that school records confirm Dane's grades were largely unaffected. (Petition pg. 7); (*cf.* Evaluation, JA-pgs. 32-33; Adams, JA-pgs. 271-273; Report Cards, JA-pgs. 201-203).

8. Petition, pg. 13: Petitioner did not "adopt several policies in response to the survey of 2002". Counselor Mansfield testified that every suggestion she made after the 2002 survey was rejected. (JA-pgs. 485, 488-495). No evidence established that the 2002 survey led to any action by Petitioner.

9. Petitioner did not initiate multiple programs from 2002-2005 aimed at combating harassment and bullying.

    a. Petition, pg. 17: Petitioner claims in 2002, it commenced the program "40 Developmental Assets" for staff, which had nothing to do with sexual harassment. (Osborne, JA-pg. 594).

    b. After Dane was sexually assaulted and permanently left campus (Johnson, JA-pg. 160, ¶36; Osborne, JA-pgs. 613-614), Petitioner, in the summer of 2005, started the Campaign for Kindness. (Dunn, JA-pg. 391-392). Bonnie Dunn was hired September, 2005. (Dunn, Appendix-pg. 7a).

c. Contrary to Petitioner's claim (Petition pg. 17), the undated, unsigned and unauthenticated document referenced, at JA-pgs. 80-81, does not support the claim that the "Character Counts" program was adopted in the 2003-2004 school year, nor is it referenced in that document.

d. *Petitioner's claim* it brought in a number of speakers from 2002-2005 to speak on issues of bullying and harassment *is misleading*. The record reflects most, if not all, of these speakers were brought in after Dane permanently left campus and Ms. Dunn's hiring in September. (Osborne, JA-pgs. 584-586; Dunn, Appendix-pg. 7a). Ms. Dunn testified speakers brought in by Petitioner included Mr. Jacoby (2005-06), Mr. Tournequist (2005-06), and Mr. Dunbar (2005-06), who spoke primarily on issues other than bullying or anti-bullying approaches. (JA-pgs. 395-397). Dr. Hinsley, a former NFL football player, spoke in 2005-06 about achieving dreams. (Johnston, JA-pg. 157, ¶13). Ms. Dunn indicated she was unaware of any speaker from the previous two years (2005, 2006) who had been specifically brought in to address bullying and harassment in the school environment. (JA-pgs. 397-398).

Respondents challenge Petitioner's claim of proactive approaches with their expert Glenn Stutzky, who opined Petitioner's methods were not proactive and

that its actions and claimed presentations while Dane was on campus ("Character Counts", "CATS", "Flirting and Hurting", "40 Developmental Assets", and "Bang, Bang, You're Dead") were not effective tools to address or remediate bullying and harassment. (Stutszky, JA-pgs. 283-286).

E. Background and Overview

1. Factual Background

Dane has experienced emotional and physical trauma related to severe and pervasive sexual harassment, which began in 6th grade and continued in 7th and 9th grades. (Warwick, JA-pgs. 170-175, ¶9-14, ¶17-21, ¶32-35; Herrick, JA-pgs. 188, 193). As a result, Dane has been psychologically unable to enter a Hudson Area School building, since May, 2005. (Warwick, JA-pg. 175, ¶33-35).

In 6th grade, Dane was frequently pushed in the hall and called names including *queer*, *faggot*, *gay*, and *pig*. The most frequent perpetrators were: (1) Joe R., (2) Zach W., (3) Jessie W., (4) Nick H., (5) Sabra W., (6) Sabin E., and (7) Kyle M. (Dane, JA-pg. 669). *These students were reported by Dane to the principal.* (*Id.* 670-672). The record does not disclose any disciplinary action for these perpetrators.

Throughout the 7th grade year, bullying and sexual harassment of Dane continued. (Dane, JA-pg. 673). Dane's experience with his peers included: (1) near daily name-calling (*fag, faggot, gay, fat pig, man boobs, big boobs*), (Dane, JA-pgs. 672-674, 752-753); (2) repeatedly

being called *Mr. Clean*, a sexually derogatory term referring to a lack of pubic hair, (*Id.* at 693); (3) frequent jostling and pushing in the hallways, (*Id.* at 754-755); and (4) being slapped by Brittany C. (*Id.* at 678). The primary perpetrators were the same ones identified in sixth grade and listed above. (*Id.* at 673). New offensive names surfaced including *fat* and *man boobs*. (*Id.* at 689-690). A new perpetrator, Brandon C., was also identified. (*Id.*). During the second semester the *Mr. Clean* connotation surfaced, (*Id.* at 692-693), with Jessie W., a named perpetrator of that incident. (*Id.* at 693). The pervasive name calling continued throughout the year (*Id.*), and *was reported to Principal Rozeveld, Counselor Mansfield, and teachers.* (See above; *Infra* at 19). The record does not disclose any disciplinary action for these perpetrators.

During 7th grade, Dane ate lunch alone in the band room to avoid the harassment. (Dane, JA-pgs. 689-690). Throughout the year, discussions occurred between Respondents and Petitioner's staff over poor academic performance, sexually derogatory name-calling, and other issues. (David, JA-pgs. 772-790, 792-806, 808; Dena, JA-pgs. 833, 839-843). Repeatedly, Petitioners asked what, if anything, Dane was doing to cause the teasing and taunting; each time Petitioner responded: "nothing". (David, JA-pgs 777-778; Dena, JA-pg. 833).

By the end of the first semester of 7th grade, Dane wanted to quit school. (David, JA-pgs. 785-786). Principal Rozeveld offered to mentor Dane to help with the struggles. *Mr. Rozeveld failed to follow through* after the first day, leaving Dane to cope for himself. (*Supra* at 8).

By the end of 7th grade, Counselor Mansfield was sufficiently concerned about Dane and contacted Lenawee ISD Social Worker Tammy Cates about a special education review. (Cates, JA-pgs. 367-368). Mrs. Mansfield and Ms. Cates filled out a referral form, which Mrs. Patterson signed. (Moeckel, JA-pgs. 576-577; Dena, JA-pg. 196, ¶3). *Respondents fully cooperated with the IEP process.* (Moeckel, JA-pgs. 573-574; Cates, JA-pgs. 369-370).

At the beginning of the 8th grade year, a Multi-Disciplinary Evaluation Team was convened to evaluate Dane for special education services. (JA-pgs. 204-205). The team found Dane to be emotionally impaired under the Individuals with Disabilities Educational Act, 20 U.S.C. § 1400, et. seq. (*Id.* at 204). An IEP Team (IEPT) was convened and a special education program developed. (IEP-8th, JA-pgs. 206-214). Dane was assigned to Mr. Adams' resource room *up to ten hours per week.* With the assignment of Mr. Adams for resource room services, Dane was able to cope with the 8th grade harassment and was able to learn. (Dane, JA-pgs. 694-695).

Dane's IEP plan was altered for the 9th grade year. (IEP-9th, JA-pgs. 216-224). Ted Adams was no longer available for resource room services, per Principal Osborne. (Dena, JA-pg. 854). However, Mr. Adams testified he began teaching high school resource room three years before his deposition, which would have been Dane's 9th grade year, (JA-pg. 346) Dane, per the IEPT's decision, remained in general education with minimal support. (IEP-9th, JA-pgs. 218-220). Mr. Adams served as a contact person for Dane for a total of 20 to 30

minutes each week. (Dena, JA-pgs. 856-857), but this was significantly less contact than in 8th grade.

In September of the 9th grade year (2004), the bullying and harassment experienced at the level of 7th grade resumed. (Dane, JA-pgs. 697-731). Immediately, Dane began to hear such words as *gay*, *fag*, *faggot*, and *queer* being directed at him. (*Id.* at 729-730). In addition the jostling, bumping, pushing and shoving in the hallways resumed. (*Id.* at 716-717). These things became multiple occurrences on a near daily basis. (*Id.* at 716-717, 729-730). Perpetrators were identified as: (1) Joe R., (2) Jeff L., (3) Cody F., (4) Jessie W., and (5) Sabin E. (*Id.* at 703). *Joe R., Jessie W., and Sabin E. were previously identified as perpetrators in 6th and 7th grade. Reports of these incidents were made by Dane to Principal Osborne.* (*Id.* at 703-705). The record does not disclose any disciplinary action for these perpetrators for these incidences.

In mid-September, the *Mr. Clean* label resumed, with an incident involving (1) Billy H., (2) Sheila C., and (3) Kelly W., (David, JA-pgs. 697-699), which brought back negative memories from 7th grade. (*Id.* at 698). Three persons were reported to Counselor Mansfield, who called these students into a meeting with Dane. These perpetrators apologized, but *no disciplinary action was administered,* (*Id.* at 702), since Mrs. Mansfield, as counselor, could not administer discipline. (Mansfield, JA-pg. 500). Instead, they were sent back to class. (*Id.* at 514). *School policy required referral to administrators.* The 2004 policy on bullying, which included harassment, funnels all complaints to

administration. (JA-pg. 277). The Student Code of Conduct[6] requires sexual harassers to be sent to the principal. (JA-pg. 306).

On December 10, 2004, Dane's daily planner was defaced in class with sexually derogatory slurs–"I love penis", "I lick it in the ass"–and sexually explicit drawings of a buttock and penis (Dane, JA-pgs. 721-724) by Joe R. (*Id.* at 717-718) and Jeff L. (Osborne, JA-pg. 597). *Dane reported the incident to the office.* (Dane, JA-pgs. 721-724). *This was not Joe R.'s first incident* which Dane reported to Respondent. (*Supra* at 11-15). Both students received a verbal reprimand from Mr. Osborne. (JA-pgs. 597-598).

A second *Mr. Clean* incident occurred on December 14, 2004 involving Kyle M. and Jeff L. (Osborne, JA-pg. 598; Dane, JA-pgs. 724-725), in which a *Mr. Clean* poster was taped to Dane's locker. *This was reported to Mr. Osborne.* (Dane, JA-pg. 725). *Each of these individuals had been previously reported to Petitioner as harassers.* (*Supra* at 11-12, 14-15). Kyle received a verbal reprimand. Jeff received a one day suspension for what Mr. Osborne described as "teasing." (JA-pg. 598). Apparently his verbal reprimand four days before failed to deter his behavior towards Dane; thereby *undercutting the Petitioner's claim of 100% effectiveness in its responses.*

Near the end of the first semester of 9th grade, an incident involving Sabin E. occurred in history class where oral presentations were made by students, using note cards. (Dane, JA-pgs. 707-711). Sabin wrote a series

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[6] Hereafter "Code"

of words on the back of his note cards with the first card designating *"Dane"*, the second *"is"*, the third "a", and the fourth *"fag"*. This act caused intense laughter, humiliating Dane. (Dane, JA-pgs. 708). *Sabin was reported to Counselor Mansfield* (Dane, JA-pgs. 707-711), who called him out of class and told Sabin his action was *possibly sexual harassment.* (JA-pgs. 521-522). Contrary to policy, as referenced above, Sabin was not referred to the principal even though *this was not Sabin's first* incident involving Dane reporting to Petitioner. (Dane, JA-pgs. 669, 673, 675, 703).

During the second semester of this 9th grade year (2005), Dane's main hallway locker was vandalized by students with permanent markers writing such things as *gay*, *fag*, and *queer*, up and down the locker. (Dane, JA-pgs. 712-716). A graphic picture was also drawn, depicting a penis being inserted into a rectum. (David, JA-pg. 805). The inside of Dane's locker was also defaced with writing including *faggot*, *queer*, and *you suck penis* and other similar phrases. (*id.* at 805). Mortified, Dane ran out of the building. (*Id.* at 804-805). This incident was reported to Mr. Durbin. (Dane, JA-pg. 715). School officials cleaned the exterior surface of the locker, after the incident was reported, but failed to clean the interior, leaving Dane and Mr. Adams to clean it (David, JA-pg. 806; Dane, JA-pgs. 712-713). Dane reported hearing that Derrick G. and Kyle M. were the perpetrators. (*Id.* at 714-715). *Kyle M. was also engaging in other acts of teasing and ridicule of Dane over the years,* including the incident of December 14th, 2004. (Dane, JA-pgs. 669, 673, 715-716, 724). (*Supra* at 11-12, 15).

On March 11, 2005, Dane's gym locker was broken into. His clothes were removed, urinated on, and his tennis shoes thrown into the toilet. (Dane, JA-pgs. 726-728). Tyler Walden reported Dane's gym locker was also covered with shaving cream spelling out sexually oriented words. (JA-pg. 152, ¶14). A report was made to Mr. Durbin of a name mentioned by the rumor mill – i.e. Derrick G. (Dane, JA-pg. 727-728).

Later, in the spring of 2005, Dane went to his main hallway locker to find a poster of "Mr. Clean" taped on the locker. (Dane, JA-pgs. 724-726). He reported this incident to Mr. Osborne. (*Id.* at 725-726).

Lastly, Dane was sexually assaulted in the locker room after baseball practice on May 23, 2005. (Dane, JA-pgs. 730-737). The primary perpetrator, Lance, while naked, forced Dane into a corner, hoisted himself up onto Dane's shoulders and took his penis and scrotum and rubbed them against the back of Dane's neck and striking the side of his face with his penis. (*Id.*). A detailed description of the assault is set forth by Dane in the police report. (JA-pg. 260). Lance attended school the Monday after the incident, even though Principal Osborne knew of the assault Saturday morning. (Dena, JA-pgs. 858-859). At the end of the day on Monday, Lance was suspended for the remaining 8-1/2 days of the school year. (Osborne, JA-pg. 596). On June 10, 2005, Lance was charged in the Probate Court with *Assault With Intent to Commit a Felony* and *Criminal Sexual Conduct - 2nd Degree.* (Records, JA-pg. 301). The Petitioner's internal investigation was completed in May, 2005 (Durbin, Appendix-pg. 8a) yet, Lance was not

formally expelled until August, 2005. (Osborne, JA-pgs. 601-603). Dane struggled completing the year after the assault. (See Appendix-pgs. 12a-14a, for more detail).

Another student, Nick H., closed the door and prevented Dane's escape from the locker room during the assault. (Statement of Billy H. JA-pg. 264; Dane, JA-pgs. 731-732). No punishment, as required by the Code, was given to Nick (Code, JA-pgs. 306, 308-309); instead a verbal reprimand was issued. (Durbin, JA-pg. 434). *This incident was not Nick's first with Dane to be reported to the Petitioner.* (*Supra* at 11-12). So severe was this incident that Billy H. Reported in a written statement, that he told Lance, "What are you doing – Dane's going to go off on you someday." (Report, JA-pg. 264).

Petitioner, at the time of the sexual assault, had a policy of supervision in the locker room, which had not been followed for a long of time, (Durbin, JA-pgs. 437-439), and was not followed at the time of the assault. (Dane, JA-pgs. 732-734).

Jeremy Beal, the varsity baseball coach, treated the sexual assault, as a joke. (Walden, JA-pg. 153, ¶24; Wade, JA-pgs. 232-233, ¶22-23). Convening a team meeting of junior varsity and varsity players, Coach Beal, in front of Dane and other players, told players they should only joke with men who can take it – thereby implying sexually assaulting another person was an acceptable manner of joking, if the victim could take it. (Walden, JA-pg. 153, ¶24). Coach Beal also emphatically stated he was not going to start supervising the locker room. (Dena, JA-pgs. 861-862).

The cumulative effect of these incidents, combined with the sexual assault, psychologically and educationally devastated Dane. (See Warwick, JA-pgs. 172-175, ¶19-21, ¶30, ¶32-35, for more details). Dane has not returned to the District or entered a District building since the end of his 9th grade year. (Osborne, JA-pgs. 613-614).

In the aftermath of the sexual assault, Dane's IEP programing was modified to provide off-site home bound services at Sacred Heart Elementary School. (IEP-10th, JA-pgs. 235-247). *This IEP was not successfully implemented.* (Warwick, JA-pgs. 173-174, ¶26-28). After Dr. Warwick pointed out Petitioner's failure to properly implement the 10th grade IEP, the IEPT reconvened and determined that Dane should obtain future credits by attending college courses. (Dena, JA-pg. 198, ¶15; IEP-11th, JA-pgs. 247-258). That program was partially successful in that Dane did not experience bullying or sexual harassment and actually experienced teachers who cared and were concerned about his education. (Dane, JA-pgs. 749-751). However, it has not been without its challenges. (Dena, JA-pg. 198, ¶12-14).

2. History of Reporting

Contrary to the Petitioner's claims, Respondents and Dane, frequently and regularly reported issues and incidents of bullying and sexual harassment. (Opinion, JA-pgs. 323-324; Dane, JA-pgs. 670, 674, 678-679, 697-698, 703-709, 714-717, 724-728, 731-747; David, JA-pgs. 788, 794, 798-799, 805-807). Staff corroborated the extensive reporting by Respondents. (Mansfield, JA-pgs. 505-508, 510-513, 520; Marry, JA-pgs. 534-536; Mason, JA-pg. 561, Adams, Appendix-pgs 2a-5a).

3. School Policy and Its Implementation

At all relevant times Respondent published in its student handbook a mission statement (JA-pg. 274), which recited basic core values. To implement its mission statement, Petitioner adopted certain policies on issues of bullying, harassment and sexual harassment. (Policies, JA-pgs. 275-280). The 2002 policy on *Harassment of Students* stated: "Harassment of students is prohibited, and will not be tolerated." This policy covered student-on-student harassment. *Harassment* was defined as "inappropriate conduct which is repeated enough, or serious enough, to negatively impact a student's educational, physical or emotional well-being." Staff repeatedly characterized the policy as either not allowing harassment or zero tolerance. (Manion, JA-pg. 456; Durbin, JA-pg. 414; Marry, JA-pgs. 538-539). *Sexual harassment*, a sub-category of the anti-harassment policy, is defined to include: a) verbal harassment or abuse, . . . c) repeated remarks with sexual or demeaning implications, . . . e) sexual jokes, posters, cartoons, etc." (Policies, JA-pg. 276)

Petitioner adopted a policy in 2004 on *Bullying And Other Aggressive Behavior Towards Students.* (*Id.* at 277-280), which stated that the board is committed to providing "a safe, positive, productive and nurturing education environment for all of the students," (*Id.* at 277), and stated that "aggressive behavior towards a student, whether by other students, staff, or third party is strictly prohibited and will not be tolerated." (*Id.*). *Aggressive behavior* included "inappropriate conduct that is repeated enough, or serious enough, to

negatively impact a student's educational, physical or emotional well-being," (*Id.*). These policies are set forth in six pages of printed policy materials. Each has a reporting requirement with the bullying policy (*which includes harassment*) requiring reporting to administration. (JA-pg. 277). The six pages are sparsely reflected in the nine pages of the Code. (Code, JA-pgs. 302-310). Eleven lines of those nine pages (1) discussed sexual harassment to include "unsolicited and unwelcome sexual comments and overtures", (2) called it misconduct, and (3) urged reporting to administration. (JA-pg. 304). The definition is not consistent with the one set forth in Petitioner's *Harassment of Students* policy. (JA-pg. 276).

Contrary to Petitioner's claims, staff is not well-trained on these policies. Staff indicated they spent little time training on the specific subjects of harassment, sexual harassment and bullying. Staff varied on the amount of time spent during in-service training on issues of bullying and harassment. Teacher Marry indicated staff training included 15-30 minutes on bullying and another 15-30 on harassment. (Marry, JA-pgs. 543-544). Teacher Mason testified staff spent 1½ to 2 hours on the Code. (Mason, JA-pgs. 566-567). Andy Wade had no training. (Wade, JA-pgs. 228-230, ¶9). These are just a few examples of the inconsistencies of staff members regarding the amount of time spent reviewing the Code and policy in relationship to bullying, harassment and sexual harassment.

Discovery confirmed inconsistent understanding by staff of issues of harassment, sexual harassment, and bullying. Comments included:

1. Media Director Bunting testified: (a) *bullying* is a student invading the space of another student, which regularly occurred at Hudson; (b) *harassment* as the same thing as bullying; (c) she handles bullying informally; (d) name calling, such as *gay, fag, faggot, queer* and *lesbian* is a frequent occurrence at Hudson; (e) she has personally observed students shoving other students in her classroom and in the hallways; (f) she rarely spends more than five minutes total in the hallways during any given day; (g) she indicated "students will be students" thereby minimizing the significance of these events. (JA-pgs. 357-360).

2. Teacher Manion testified: (a) *bullying* is giving another person a tough time in order to demean them; (b) *harassment* is the same as bullying; (c) she has seen incidents of bullying over her years at Hudson; (d) she has heard name calling (*gay* and other sexually graphic names); (e) she has her own standard of discipline for these things, which did not include a formal write up and office notification. (JA-pgs. 445-450).

3. Counselor Mansfield testified: (a) she could not specifically define *bullying* because it included a complex set of parameters; (b) being called *fat, fag*, and *gay* on a regular basis was considered bullying; (c) physical violence constituted bullying

or harassment; (d) being jostled or shoved into a locker on a regular basis would be deemed harassment; (e) being called *gay, fag, faggot* or *fat pig* is harassment; (f) sexually oriented graphic content painted on a locker is harassment, as is urinating on a person's clothing or throwing gym shoes in a toilet. (JA-pgs. 499-504). In the context of staff preparations for a school year, sexual harassment was discussed, but not as a formal agenda item at staff meetings, and was only covered in general terms. (*Id.* at 502).

4. Teacher Marry testified: (a) *bullying* occurs "when anyone touches or makes another student feel unwanted or uncomfortable in my classroom and interferes with my teaching", and (b) sexual harassment is worse. *Responses to such incidents are left to individual teacher's discretion.* (JA-pgs. 538-539).

5. Teacher Mason testified: (a) *teasing* is intentionally saying things to hurt another person's feelings; (b) *bullying* is intimidating someone with words or actions; (c) *harassment* is repeatedly intimidating another person; (d) she has heard students use the terms *fag, gay, faggot* and *queer* in the school environment. *When confronted with those issues, she refers students to Counselor Mansfield, not administrators.* (JA-pgs. 562-564).

6. Teacher Adams informed Angela Johnston that the District did not have a consistent and formal

> plan to deal with bullying, nor the support of the administration to respond to these issues. (Johnston JA-pg. 158, ¶18-22).

These comments reveal *teachers did not have a uniform understanding of Petitioner's Policy* on "harassment", "sexual harassment", and "bullying", nor had consistent responses towards said behaviors. This issue is reinforced by the Affidavit of Andrew Wade, (Wade, JA-pgs. 227-230, ¶7-9), who stated, as a coach and as a permanent substitute teacher, he received no training at all on these issues. *This evidence contradicts Petitioner's assertion that staff is well-trained.* Staff did not recognize the mandatory requirement of the policy on bullying to report matters to an administrator. *Supra* at 14-16 (Mansfield), 22 (Bunting, Manion), 23 (Marry, Mason).

Students also were not uniformly and consistently instructed on issues of bullying, harassment and sexual harassment. Assistant Principal Durbin testified that the Code was presented to students annually at an assembly or conducted grade-by-grade, said manner having been used for years. (Durbin, JA-pgs. 428-429). Teacher Marry indicated that the Code was disseminated by teachers on the first day of each academic year as part of first period and, *if time permitted*, was reviewed with the students. He allocated between 1-45 minutes to discuss the Code, "time permitting". (JA-pgs. 540-542). Teacher Mason indicated that she spent 20-25 minutes on the first day of class each year discussing the Code (JA-pgs. 565-566).

Students contradicted staff regarding presentation of the Code. Sara Dempsey stated teachers would read the student handbook, but not explain the terms or the material. (JA-pgs. 133-134, ¶6). Ryan Hobbs indicated teachers did not go over the Code, but rather sent the handbook home with them. (JA-pg. 138, ¶9,). Emily Kline, in 13 years of attendance at Hudson, remembered only two occasions when teachers reviewed the Code with her class and only by reading it without explanation. (JA-pg. 145, ¶10).

As to issues of harassment in the environment, Assistant Principal Durbin testified, (Durbin, JA-pgs. 415-421, 424-427): (a) *harassment* is continuous and repeated acts of a negative nature; (b) core values of Hudson are violated by bullying, harassment and sexual derogatory name calling; (c) sexually oriented language could undermine core values, if the student doesn't feel safe; (d) sexually derogatory name calling is a violation of core values; (e) repetitive name calling of *gay*, *fag*, etc., directed towards someone violates core values; (f) pushing and shoving someone in the hallways and into lockers violates core values; and (g) for discipline to be effective it must be consistent and fairly applied. Mr. Durbin acknowledged that he was personally aware of students that did not feel safe at school (*Id.* at 418), which was supported by Sarah Dempsey. (JA-pg. 134, ¶13-14).

Glen Stutszky, Respondent's expert on school abuse, bullying and harassment, opined Petitioner was not proactive in addressing bullying and harassment and also lacked understanding of the condition and environment as to these issues. (Stutzky, JA-pgs. 283-

286, ¶7-8). Bonnie Dunn acknowledged Mr. Stutszky as a leading expert in this field. (Dunn, JA-pg. 386). Proactive methods, *which are essential in combating a hostile environment*, were not implemented in this District. (Dunn, JA-pgs. 385-386, 398-404; Stutzky, JA-pgs. 283-285, ¶7-8). Petitioner has no expert to contradict Mr. Stutzky.

Counselor Mansfield testified, (JA-pgs. 485-494): (a) for the 2002-2003 school year, the counseling department (with her efforts) conducted an all school survey which included issues of bullying, harassment and sexual harassment, to obtain a feel for the environment and determine how to allocate counseling resources; (b) the survey revealed feelings throughout the student body of a need for counseling services relating to areas of bullying and sexual harassment; (c) to address issues of bullying and harassment, she suggested programs to address these issues by raising awareness; and (d) these items needed to be part of a proactive approach. *Her proposed proactive plan related to bullying, harassment, and sexual harassment was rejected by Superintendent Malnar*, who did not believe they would do any good. Immediately thereafter, her department staff was cut and she was unable to implement any programs.

Bonnie Dunn was hired, *after the sexual assault upon Dane*, by the District as a Community and School's Coordinator. She conducted a student survey at the beginning of the 2005-2006 academic year, specifically related to bullying. (JA-pgs. 391-392), which revealed the following results: (a) Petitioner continued to have a bullying issue which needed to be addressed;

(b) students perceived bullying as a problem, that there was not a consistent disciplinary response to these issues, and that nothing would be done about it. She also indicated: it takes years of effort to combat the effects of teasing, taunting and harassment and to break the cycle of those activities (*Id.* at 401); Petitioner needed to implement a formal school wide proactive anti-bullying program, uniform from grades K-12 to effectively combat bullying and harassment (*Id.* at 385); a consistent disciplinary policy in response to bullying, harassment and teasing was necessary to successfully combat these things (*Id.* at 406-407); and lack of a consistent disciplinary policies created an impression within the student body that undermines efforts to deal with bullying and harassing (*Id.* at 407).

REASONS FOR DENYING THE PETITION

The Sixth Circuit Opinion is based on a lucid analysis of the facts and procedural rules regarding summary judgment review, does not conflict with any decision of this Court nor any Court of Appeals, and is not impractical. Petitioner cites to several "undisputed" facts, which have been properly disputed by the Respondent. In its Opinion, the Majority correctly drew all reasonable inferences in the Respondent's favor. The Majority was also consistent with existing precedent and ruled that several persuasive cases touted by Petitioner as factually analogous were distinguishable. Petitioner also made no attempt to distinguish a persuasive case that the Majority described as "strikingly similar." Lastly, Petitioner argues that by correctly following summary judgment standards and remanding a case with material issues of fact back to trial, the Majority's

decision is impractical and will open the floodgates of litigation against school districts. This argument is without merit because the Majority's holding did not find liability against Petitioner, but rather correctly stated that under the present facts, the case should proceed to trial, a decision which does not set impractical standards. Accordingly, it is not appropriate for this Court to grant certiorari, nor has Petitioner carried their burden of demonstrating any "compelling reasons" for the Petition to be granted. See Sup. Ct. R. 10.

I. The Majority Below Contains a Lucid Analysis of Facts and Procedural Standards Regarding Summary Judgment Review

The Sixth Circuit Court of Appeals, in *Patterson*, 551 F.3d at 444, cites the correct standard for reviewing summary judgment. The Court is to review all the evidence and "draw all reasonable inferences in favor of the nonmoving party." *Crawford v. Metro. Gov't of Nashville and Davidson County*, __ U.S. __, 129 S.Ct. 846, 850, FN1, 172 L.Ed.2d 650 (2009) (citations omitted). It must also determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). This Court has determined that a dispute over a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248.

Respondent has outlined in detail many disputes of material fact presently existing in this case. *Supra* at 2-

27. The Majority noted several disputes of material fact. *Patterson*, 551 F.3d at 446, FN 6, (use of the resource room and Mr. Adams); see also *Id.* at 450, FN10, (Petitioner's "proactive" measures of dealing with harassment). The Majority correctly viewed the evidence in the light most favorable to Respondents, and even chastised the Dissent for weighing conflicting evidence in the moving party's favor. *Id.* at 445-446, FN6.

Lastly, while the Majority correctly dismissed the Dissent's "100% effective" argument, the Majority focuses on the harassment Dane suffered in the 9th grade alone. When considering the previous years of reported harassment, it clearly shows that Petitioner's responses were not 100% effective against individual harassers, but that Petitioner had notice some students who harassed Dane in 6th and 7th grade also harassed him against in 9th grade. *Supra* at 11-14. Given the many disputes of fact in the present case, precedent compels the Court to draw all reasonable inferences in favor of Respondents. The Majority correctly applied this standard and found summary judgment was inappropriate pending resolution of those factual issues.

II. The Majority Correctly Follows Controlling Case Law

Petitioner asserts the Majority conflicts with this Court's opinion in *Davis*, 526 U.S. 629, and its "progeny". Under *Davis*, a plaintiff must show the following elements to establish a *prima facie* case of student-on-student sexual harassment under Title IX:

(1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said

to deprive the plaintiff of access to the educational opportunities or benefits provided by the school;

(2) the funding recipient had actual knowledge of the sexual harassment; and

(3) the school was deliberately indifferent to the harassment.

Davis, at 653. The relevant inquiry at the Sixth Circuit was whether Petitioner acted with deliberate indifference.

"[T]he deliberate indifference must, at a minimum, cause [students] to undergo" harassment or "make them liable or vulnerable" to it. *Id.* at 645 (citations omitted). While the respondent in *Davis* contended that expulsion should be required for every student accused of sexually harassing another, the Court rejected the idea that a district must purge "their schools of actionable peer harassment or . . . engage in particular disciplinary action." *Id.* at 648. Indeed, the Court noted that "[s]chool administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id.*

Respondents agree a district does not have to purge or eradicate peer harassment, but, is liable for such harassment when its response or lack of response is clearly unreasonable in light of the known

circumstances. *Davis*, 526 U.S. at 648. Therefore, a school district must "*merely respond* to known peer harassment in a manner that is not *clearly unreasonable.*" *Id.* at 648-649 (Emphasis added).

A. The Majority Does Not Conflict With *Davis* Nor *Vance*

In forming its ruling, the Sixth Circuit relied on its decision in *Vance*, 231 F.3d 253. *Vance* correctly cited to and analyzed the facts of that case under the *Davis* standard described above. *Id.* at 260. The Sixth Circuit also asserted that

> where a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

Id. at 261. By this statement the Sixth Circuit rejected that Spencer County's argument that "as long as a school district does something in response to harassment, it has satisfied the standard." *Id.* at 260. This language in *Vance* is consistent with the holding in *Davis*; in both cases, the respective districts failed to change their remedial action despite continued harassment against a student.

Petitioner makes a three-fold argument that the Majority conflicts with existing precedent: (1) that multiple cases suggest that any mere response satisfies the *Davis* standard; (2) that certain language in the *Vance* holding does not apply to this case because the harassment suffered by Dane was not as "egregious" and *Vance* is, therefore, factually distinguishable; and (3) that the Majority's Opinion requires schools to "remedy" or "purge" themselves of sexual harassment to survive at the summary judgment level.

First, as the Sixth Circuit Opinion clearly noted, *Vance* rejects the notion that any response satisfies the *Davis* standard. *Patterson*, 551 F.3d at 448. Cases cited by Petitioner for this proposition are clearly distinguishable: (1) *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1121-24 (10th Cir. 2008) (issues of reporting the harassment and the school deferred to police because it believed the incidents happened off school grounds); (2) *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000) (involved sexual harassment of a student by a teacher); (3) *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 174 (1st Cir. 2007) (involved harassment by one student, who rejected the allegations and was found credible by the administration and the; (4) *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 407 (1997) (pre-*Davis* standard); (5) *Wilson v. Beaumont Indep. School Dist.*, 144 F.Supp.2d 690 (E.D. Tex. 2001) (distinguished at *Patterson*, 551 F.3d 449, FN 8); (6) and *Johnson v. Independent Sch. Dist.*, 194 F.Supp.2d 939, 948 (Dist. Minn. 2002) (also distinguished at *Patterson*, 551 F.3d 449, FN 8).

Furthermore, as noted by the Majority, Petitioner does not attempt to distinguish analogous case law with unfavorable rulings, specifically *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F.Supp.2d 952, 966 (D. Kan. 2005), which the Majority appropriately found persuasive and "illustrative" because of the "striking similarities" between the cases. *Patterson*, 551 F.3d. at 446-449. Other persuasive cases suggest certain failures by a school district may constitute deliberate indifference. *Murrell v. Sch. Dist. No. 1, Denver, Col.*, 186 F.3d 1238, 1249 (10th Cir. 1999); *Morlock v. West Cent. Educ. Dist.*, 46 F.Supp.2d 892, 909-910 (D. Minn. 1999); *Montgomery v. Indep. School District No. 709*, 109 F.Supp.2d 1081, 1095 (D. Minn. 2000); *Schroeder v. Maumee Bd. Of Educ.*, 296 F.Supp.2d 869, 880 (N.D. Ohio 2003).

There is sufficient case law to contradict Petitioner's assertion that any response is enough to satisfy the *Davis* standard. The persuasive authority cited by Petitioner is not controlling nor is factually analogous. Indeed, *Davis* alone contradicts this assertion – a district's mere responses must not be clearly unreasonable. *Davis*, 526 U.S. at 648-649.

Second, Petitioner attempts to narrowly construe the *Vance* holding as applying only to cases with a similar factual background, i.e., that offending students must re-offend, and the school district must continue to repeat the same ineffective responses to those offenders to create an issue for the trier of fact as to what is clearly unreasonable. Neither *Davis*, *Vance*, nor any post-*Vance* authority asserts this proposition. Instead, *Vance* rejects a minimalist response to known severe,

pervasive, and objectively offensive harassment against a student. *Id.* 231 F.3d at 260. Even if the Petitioner's standard would apply, which Respondent challenges, the evidence in this case suggests that the Petitioner did repeat ineffective responses against know offenders. *Supra* at 11-14.

Further, the Dissent and Petitioner recite, but misstate, several key facts in *Vance*. The facts, identify several offenders from November 1992 to August 1995, only some of which were re-offenders. *Vance*, 231 F.3d at 256-258. The Sixth Circuit, cited to three instances that showed Spencer's deliberate indifference, none of which involved a re-offending student. *Id.* at 262. After referencing these instances, the Sixth Circuit noted "in numerous instances, Spencer continued to use the same ineffective methods to no acknowledged avail." *Id.*

Third, Petitioner misconstrues the Majority's holding by focusing on the use of the word "prevent" without providing the correct context for that word. "As explained above, Hudson's success with individual students did not prevent the over-all and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law." *Patterson*, 551 F.3d at 449. Previously, the Majority had outlined the *Vance* framework as to what is unreasonable. "We believe this language makes clear that, even though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable." *Patterson*, 551 F.3d at 448. In

other words, the Majority states, citing *Theno*, 377 F.Supp.2d 952 as persuasive authority, that continuing harassment against a student puts a school district on notice that its responses to said harassment may not be effective, thus creating a potential triable issue of fact as to whether or not the responses were clearly unreasonable. In the present case, the trier of fact is also required to determine what responses Petitioner actually implemented to combat the sexual harassment against Dane. *Patterson*, 551 F.3d at 446, FN 6. Thus, the Majority correctly followed the relevant and binding authority.

B. The Majority Below Is Not In Conflict With The Third Circuit, As *Doe v. Bellefonte Area School Dist.*, Is Factually Distinguishable

Following the drum of the Dissent, Petitioner has touted *Doe v. Bellefonte Area Sch. Dist.*, 2003 WL 23718302 (M.D. Pa. Sept. 29, 2003), *aff'd* 106 Fed. Appx. 798 (3rd Cir. 2004) as having "substantially similar facts." In *Doe*, the district court set out the pertinent facts at 2003 WL 23718302, *2-6. The facts showed that Doe suffered systematic verbal sexual harassment with multiple offenders over a period of several years. The facts also showed questions regarding Doe's reporting, and Doe's willingness to accept the district's methods of responding to the harassment.

Over the years, the responses to the harassing students varied: (1) a two day suspension with two detentions; (2) keeping a student apart from Doe; (3) a verbal warning in the face of a denial from the offending student; (4) moving Doe and his friends to a different

study hall; (5) a verbal warning to a student who harassed Doe two years prior; (6) a detention; (7) an apology with a full day detention; and (8) a three-day suspension along with a detention for Doe after he traded insults and sexually harassing words with another student. *Id.*

Responses in addition to disciplining offending students included: (1) four memoranda circulated to teachers regarding Doe's situation and sexual harassment; (2) a gym-class discussion on name-calling; (3) a meeting with Doe, Doe's parents, and school administrators; (4) the offer of a hallway "buddy" for Doe; (5) placing Doe on the "Anti-harassment Committee"; (6) allowing Doe special procedures to report harassment not given to other students; and (7) policies, assemblies, and speakers specifically addressing harassment. *Id.*

The present case and *Doe* are factually distinguishable. As noted by the Majority:

> *Doe* . . . is different from this case in two material respects. First, in *Doe*, the school district did more to prevent the systematic harassment of Doe than Hudson did in instant case. Specifically, the school district gave Doe "a special means of reporting any additional harassment," circulated memoranda specific to Doe's harassment issues to the faculty in hopes of preventing future harassment, and "held assemblies and enacted policies addressing peer-to-peer harassment." *Doe*, 106 Fed. Appx. at 800. As outlined above, when

> viewing the facts in the light most favorable to the Pattersons, we observe that Hudson did not perform any of these services during DP's night-grade year. Thus, Doe is distinguishable from the instant case by the effort the school district devoted to preventing future harassment.

Patterson, 551 F.3d 448, FN 7. Secondly, the Majority noted that *Doe* neither cites to nor is bound by *Vance*, rebutting the Dissent's contention that *Doe* tacitly rejected the Majority's interpretation of *Vance*.

Lastly, it should be noted the school policy in *Doe* gave the district the discretion to choose the punishment for harassing students. No punishments were mandated. It appears that as the verbal harassment against Doe continued, the *Doe* district moved from verbal warnings to tougher punishments, culminating into two punishments for the reported incidents in Doe's final year: an apology and a full day suspension for a student who yelled "[Doe] is sexy" out of a classroom window, and a three day suspension for a student with whom Doe traded sexually harassing insults. *Doe*, 2003 WL 23718302, at *5.

In summary, even though harassment continued from new offenders, the *Doe* district did not just repeat the same ineffective responses. The *Doe* district increased the severity of the punishment for offending students and attempted other means at addressing the harassment issue.

III. The Majority's Opinion Is Not Impractical, Rather Is Based On Sound Logic

Petitioner warns that the Majority, in effect, opens the floodgates of litigation because it sets nearly impossible standards and schools must now "prevent" future harassment by unidentified harassers. Again, Petitioner misconstrues the Majority's holding.

As stated by the Sixth Circuit Majority,

> [w]e emphasize that, at this state of the litigation, the Pattersons are not required to prove that Hudson is actually liable for the continued harassment of DP (i.e., that Hudson's actions were clearly unreasonable), but only that there is a genuine issue of material fact as to whether Hudson was deliberately indifferent to the harassment.

Patterson, 551 F.3d at 450.

The Third Circuit, in the previously analyzed *Doe v. Bellefonte Area School Dist.*, states an identical standard: "[w]e agree with the District Court that Doe failed to adduce evidence to create a germane issue as to whether the actions taken by the School District in response to the allegations were clearly unreasonable and therefore that the School District could not have been found deliberately indifferent." *Doe*, 106 Fed.Appx. at 799.

The difference in the facts led to the determination. In *Doe*, the court found no genuine issue of material

fact which suggested the district's responses were clearly unreasonable, thus the district, as a matter of law, could not be found to be deliberately indifferent. In the present case, the Sixth Circuit found that genuine issues of material fact existed, thus Petitioner could not be shielded from liability as a matter of law.

While the Sixth Circuit did not impose liability against Petitioner, it allows for the possibility of a jury to do so. Petitioner bootstrapped to its argument confidential settlement offers between the parties in attempt to show the potential cost to Hudson. This settlement offer has not been made part of this record, thus is not properly before this Court. To suggest that the Sixth Circuit's Opinion automatically creates or imposes some financial liability on school districts misconstrues the holding. With the present facts, there is a genuine issue of material fact as to Petitioner's deliberate indifference, because despite continuing harassment against Dane, Hudson implemented the same responses, refusing to comply with their own policies and procedures, and refusing to attempt any alternative means of dealing with the harassment. This is in direct contrast to the actions of the school district in *Doe*. Thus, the Sixth Circuit's Opinion changes nothing, because it conforms with precedent established in *Davis* and *Vance*, and also recognizes persuasive authority from other districts.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request this Petition be denied.

Respectfully submitted,

TERRY E. HEISS
Counsel of Record
TERRY E. HEISS, P.C.
6440 East Fulton St.
Suite 201
Ada, MI 49301
(616) 676-3850

JEFFREY P. ARNSON
LAW OFFICE OF JEFFREY
P. ARNSON, PLLC
6440 East Fulton St.
Suite 201
Ada, MI 49301
(616) 676-3850

Counsel for Respondents

APPENDIX

Excerpt of Deposition of Ted Adams - November 7, 2006, filed in district court

Transcript - Page 10:

Q. Describe the Pattersons as parents.

A. The Pattersons are supportive parents. They like to be communicated with to know the status of their students' education. I'm speaking from an educator's standpoint now right now.

Q. Sure.

A. .....Supportive, and follow through when asked to do something, and they in turn have communicated things to me that they would like followed up on.

Q. Such as what?

A. Primarily academic issues, missing assignments, slipping grades, those kind of things.

Q. Have you ever thought to yourself or expressed to anyone a belief or a feeling that the Pattersons are too involved in their children's education?

A. I have never expressed that.

Q. Do you think that they are appropriately involved in their children's education?

A. From my perspective, when I have asked them to follow up on things, and when they have asked me to follow up on things, we get it taken care of in the best interests of the children

.....

Transcript - Page 11:

.....

Q. And they have offered themselves to be available to help accomplish a good education

for their children?

A. Yes.

.....

Q. They have asked questions of you as to what they can do as parents to help their children's education process?

A. Yes.

.....

Q. And you have given them suggestions, and they have been able to follow through on those?

A. Yes.

Q. Okay. I'm just trying to make sure I understand what you are saying. Do you socialize with the parents outside of school?

A. We haven't had much opportunity to do that. We have had occasion at Science Olympiad events to have conversations, but –

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.....

Q. Okay. Do you remember, as part of the MET review or the MET evaluation and the subsequent IEP team determinations, what the issues were for Dane that was part of his emotional impairment?

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A. Dane -- as I remember, Dane was having difficulties with some interpersonal relationships with his peers, and his academics were suffering. The grades were lower than what they had been previous to that.

.....

Q. Do you recall at any point in time discussing with Dane or his parents names of sexually

derogatory nature being called or pointed to him, like fag, gay, fat pig, things of that nature?

A. I remember just having conversations with his parents about that, yes.

Q. Okay. Did Dane ever discuss those kinds of things with you or how he was feeling about his peers?

A. I don't recall him directly conversing with me on that, no. On a day-to-day basis we dealt with fluctuations in how he was feeling, mostly about academics though.

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Q. In your opinion, how did Dane handle that?

A. Gradewise, I had a lot of communications with the parents when things were not what I was comfortable with, what I thought they needed to be, what I thought they would want them to be, and we were able to pull it together, and he was able to put more effort into some of the areas that maybe he had let slide for a little while.

Q. Did anxiety affect his school performance?

A. I think anxiety affects a lot of students' performance.

Q. Okay.

A. It may have had a factor in Dane's academic performance.

Q. Was some of his anxiety related to his peer issues in that 9th grade year?

A. I think some anxiety may have been brought on by negative interaction with peers.

Q. In fact, you letter references several incidents

throughout the year that caused some setbacks, the top of page two; right?

A. Specifically I was involved with the planner incident.

Q. What was the planner incident?

A. Dave Patterson had contacted me and was concerned that

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Dane -- someone had graffitied in Dane's planner, written some derogatory remarks. I can't recall what they were at this point in time. So I instructed Dave to come in, and he brought some of the pieces of the planner that had been removed I believe, and he also said that Dane had -- I'm trying to remember -- Dane had not brought all of them home, but there was some of them home. So Dave brought them in. I wasn't comfortable with doing anything about that situation from a disciplinary standpoint. So I went and we found Mike Osborne and showed him the pages of the planner and took the information that Dave had at that point in time, that Dane had shared with him, took the information that Dane had shared, and I think at that point in time I don't think there was any more involvement on my part with the subsequent follow-up investigation and those kind of things.

Q. Were some of the things written that you said were derogatory, were they things like gay, fag, queer, those kind of things?

A. I don't remember seeing those specific things written on the pages. Like I said, I saw one page, and I don't remember what was written on

that. And Dane had maybe crumpled up the other pages and did not share them immediately with Dave Patterson, and I don't know if they came up later or not.

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Q. Apparently the page that you saw was disconcerting enough that you sought out Mr. Osborne?

A. I don't remember what exactly was said on there, or the fact that Dave had contacted me, and I was going to follow up to the best I could and act as a liaison there, to make sure it got to who could deal with that situation the best.

Q. did Dave Patterson come in with names of alleged perpetrators?

A. I believe that he did, yes, because I recall Mike Osborne getting those names.

Q. Okay.

A. I don't remember who the names were, but --

Q. Okay. Did you find out later if any disciplinary action had been taken as to those students?

A. Usually directly I don't get, because I did not write a referral or anything. That was something that Mr. Osborne handled. I didn't have any direct knowledge of what might -- what consequence might have taken place.

Q. Okay. Do you remember any other incidents that you were referring in your letter?

A. Well, one incident Dane did come to me that someone had written something on the outside of his locker, and so I called the custodial staff, and someone went down immediately or very soon after and cleaned off whatever it

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was. I don't think that I ever actually saw what was written on the outside of his locker, but I applauded Dane for coming to me to have it taken care of.

Q. It says: Dane utilized me as a resource when students defaced his locker with sexual slurs. So you didn't actually see the language, or was that reported by Dane?

A. I believe that would have been reported by Dane.

Q. Dane remembers you going down third period and helping take that off, because janitorial staff hadn't gotten around to that yet. Do you remember that?

A. I don't remember that specifically. It -- I can't -- can't confirm that one. But that does sound like something I would do.

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Transcript - Page 37:

Q. Okay. And you are aware of the sexual assault that Dane experienced his 9th grade year?

A. Yes. Dena Patterson shared that with me.

Q. When did you first hear about it?

A. It was near the end of Dane's 9th grade year, in a phone conversation that I had with Dena.

Q. Now, it says here: When Dane is frustrated he turns his anxiety inside himself. His frustration is manifested in not completing work consistently and withdrawing from activities. That's your experience with Dane, that as he gets frustrated, he tends to become hard on himself or go inside himself?

A. Those are things that we had discussed at the

IEP and shared.

Q. and is that consistent with what you have observed of Dane as well?

A. That see ms to be a consistent pattern with Dane, yes.

Q. And Dane does not act out his frustrations. So most of the time it goes inward is what you are saying there? He's not a behavior problem as a result of his anxieties and frustrations?

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Excerpt of Deposition of Bonnie Dunn - December 4, 2006, filed in district court

Transcript - Page 2:

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Q. Bonnie, I understand that you are employed by the Hudson Area Schools. Is that Correct?

A. Yes, I am.

Q. What is your job capacity?

A. Communities and schools coordinator....

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Transcript - Page 4:

Q. And when did you start that position?

A. Last year, the beginning of the '05 school year.

Q. So the '05-'06 year?

A. Right

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Excerpt of Deposition of Thomas Durbin - December 4, 2006, filed in district court

Transcript - Page 79:

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Q. Turning back to Mr. Patrick a minute, when was the investigation for your part completed?
A. I believe it was completed within that day or within the next half day.....
Q. Do you know when the entire investigation was completed by Mr. Osborne or anyone else?

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Q. So by the time Mr. Patrick had been suspended, would the investigation have been completed?
A. The initial investigation, yes.

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Q. Did there come a point in time when Mr. Osborne came to you and said he had finished his investigation and determined what to do what, if anything else, to do with Mr. Patrick?
A. Yes. I believe he came to me and said this is how he saw it at the time, and that he was investigating whether it was a criminal sexual conduct or not.
Q. And that would have been also in that week that you had first learned of it?
A. In that first week? I don't remember the time frame.

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Q. Certainly by the time school was out?
A. As far as the school year?
Q. Yes.
A. Yes.

Excerpt of Deposition of Dena Jean Patterson – October 26, 2006, filed in district court

Transcript - Page 121:

Q. ..... Do you recall what the purpose of the referral was? Was it bullying issues or was it anxiety?

A. It was about overall I needed to know where he's at. You are talking about two parents who are hanging by a thread and we're trying to see what he could do in the school environment to get him through this school year to where he will come back the next year.

Q. Was there a specific reason that you cited for the referral in your request?

A. I just told you, I know – I needed to – he was having rouble academically. I already knew emotionally he had issues. I didn't need the school to clarify that. Once I mentioned it to the social worker did assess.

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Q. Which social worker are you talking about?

A. Tammy Cates.

Q. The meeting with Tammy Cates though was in the summer after the referral, correct?

A. Tammy Cates took up upon herself to test Dane. She did a simple assessment if you will...It was an assessment that she ended up coming to – she approached David and I and said that on this particular form the only thing that Dane didn't admit to is Dane trying to kill himself. She was very concerned. She thought it was a good idea that we were pursuing the testing.

This was a simple little – some kind of assessment...

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Q. Are you meaning throughout the summer also?

A. No, no. I didn't make myself clear. I'm sorry. I was stating that Mr. Adams was working so hard that we were disappointed at the next IEP. As you know you have the IEP's at the end of the year, same school year, so at the end of eighth grade is when he had the IEP for next year. That's when we were told we couldn't continue with Mr. Adams.

Q. Who told you you couldn't continue with Mr. Adams?

A. Mr. Mike Osborne, the principal at the high school.

Q. My understanding is though that Dane did continue with Ted Adams in ninth grade.

A. On a consulting basis, it was 20 to 30 minutes per week. He was not allowed to stay on as a resource room capacity because he was only a middle school.

Q. So you wanted Dane to continue with Ted Adams on the same basis as eight grade?

A. We begged.

Q. In your Answers to Interrogatories here you stated

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that "We decided not to place Dane with another high school resource room teacher." Was it just Mr. Adams – Mr. Adams is the only high school resource room teacher; isn't that correct?

A. No. He's only middle school...We were disappointed at the end of that school year at the IEP when Mr. Michael Osborne, the principal stated...first of all we said we want to have Mr. Adams, obviously Mr. Adams will be the study skills for Dane; right? And he said no, Mr. Adams is the middle school resource room teacher. We begged, even if Dane doesn't mind coming in with eight graders could he come in and still use Mr. Adam for resource room because this was working...We asked – we begged and then first thing he said, well, you can't pick...

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But at the end of the day he said Mr. Adams definitely couldn't be Dane's resource room teacher because he was the middle school.

So then we were faced with the choice of putting him in the other resource room which had the EI kinds in. Everyone at the table, Mr. Osborne included, didn't think that was the place for Dane.

Q. Was that you included, you didn't believe that was the place for Dane?

A. ...I was depending upon the professional there at the table. Mr. Adams, Mr. Osborne, all of the professionals at the table were stating that that EI resource room they would have concerns...But it was very clear that they didn't think that was the place.

So again the options, Mr. Osborne said, well – and obviously I think it says 20 to 30

minutes per week...And I would rather take Mr. Adams 20 to 30 minutes than not have anybody at all. So we have already eliminated the EI resource

Transcript - Page 139:

room isn't the place, that was option A.

The other option B is to take – because Mr. Adams – the way Mr. Osborne put it was that Mr. Adams was willing to basically do this and the school was allowing them – allowing him – to do it and act in that capacity. They would put it down for I believe 20 to 30 minutes per week but it would be on like a consultant basis; not as a resource room teacher. It could have been listed as resource room and I thing it is but it's very minimal.

Q. Okay. So you ultimately decided that youdidn't want Dane with another high school resource room teacher; is that correct"

A. Yes. From what the team decided. I don't think that was an ultimate decision of David and mine....

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Q. And a meeting was set up for the next morning; correct?

A. Yes, sir, at 9:00 a.m.

Q. You appeared at the meeting, correct?

A. Yes, sir.

Q. Your husband was not there; correct?

A. No. At that point Dane couldn't be left alone at home, so he stayed home with Dane while I attended the meeting.

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Q. So Dane ended up coming to school around 11:30 if I'm remembering correctly?

A. Yes, sir.

Q. And he ended up meeting with Mr. Osborne, is that right?

A. Yes, sir. After we brought him in, yes, sir.

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Q. Okay. Did Dane stay at school the rest of the day to the best of your knowledge?

A. The last whatever couple of hours were left in the day.

Q. Just for general knowledge how long did the school day last?

A. ...I thing it was like 8:00 to 3:00, something like that, ball park.

Q. All right. .... So after that Monday was there any resolution?

A. Well, we were – Monday David and I made sure we were available after school to where the baseball field is locates where we could keep Dane in our sight. It was at first Dane didn't want to play anymore but he also knew that everyone on the team – we knew that Lance – at least Lance would be kicked off the baseball team. It happened at a baseball practice, so we're assuming that he would be at least kicked out of baseball. So Dane knew if he didn't play the team would end up forfeiting the rest of their season and that was

a real concern for Dane because then he said the rest of the kids...

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Transcript - Page 164:

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So on then on Wednesday we're still trying to get Dane through the week with getting there half days, some days in the afternoon, some days in the morning. Because he was told that if he – he was expected to come back to school obviously. By Tuesday he had had a couple of kids approach him about telling him that he better watch his back, there were kids that wanted to kill him.

Q. Was there a report to the school do you know?

A. Reported that to Mr. Osborne and Mrs. Mansfield....